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REPORT OF THE U.S. TARIFF COMMISSION ON S. CON. RES. 38, REGARDING THE INTERNATIONAL ANTIDUMPING CODE SIGNED AT GENEVA ON JUNE 30, 1967

COMMITTEE ON FINANCE
UNITED STATES SENATE

(NOTE.—This report has not been reviewed by the Committee. It is published only for the information of the public, but does not reflect the approval or disapproval of the Committee or any member thereof.)

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REPORT OF THE MAJORITY 1/

S. Con. Res. 38 of the 90th Congress states that it is the sense of Congress that --

> (1) the provisions of the International Antidumping Code, signed at Geneva on June 30, 1967, are inconsistent with, and in conflict with, the provisions of the Antidumping Act, 1921;
>
> (2) the President should submit the International Antidumping Code to the Senate for its advice and consent in accordance with article II, section 2, of the Constitution of the United States; and
>
> (3) the provisions of the International Antidumping Code should become effective in the United States only at the time specified in legislation enacted by the Congress to implement the provisions of the Code.

1/ Vice Chairman Sutton and Commissioners Culliton and Clubb comprise the majority. Additional comments by Commissioner Clubb are set forth beginning on page 34. The Separate Views of Chairman Metzger and Commissioner Thunberg appear following page 48.

The International Antidumping Code, 1/ which was negotiated within the framework of the General Agreement on Tariffs and Trade (GATT), has as its objective the establishment of basic principles with respect to antidumping measures that shall be observed by all contracting parties signatory to the Code and requires such parties to change their laws, regulations and practices when necessary to conform to these principles.

Dumping, which is a particular unfair trade practice also known as price discrimination, is condemned in the United States, both in interstate and international trade. The Antidumping Act, 1921, as amended, is only one of several acts of the United States Congress which deal with price discrimination in international trade.

The report 2/ discusses the present United States laws relating to price discrimination, the international obligations of the United States under the General Agreement on Tariffs and Trade (GATT) relating to antidumping measures, a comparison of the Code with the relevant United

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1/ Hereinafter referred to as the Code.

2/ In considering this report, note should be made of the fact that the Code has had to be examined in its bare form. There are neither published official contemporaneous reports of the negotiators nor authoritative interpretations of the GATT contracting parties concerning the Code which would serve as aids in its interpretation. In contrast, the U.S. acts have been examined in light of their legislative history and judicial precedent. Moreover, the Code is expressed in part in terminology which does not appear to have special meaning in the field of unfair trade practices whereas the key words and terms used in U.S. statutes are words of art having definite meanings derived from legislative history and judicial precedent.

States laws, and implementation of the Code by the United States.

U.S. Laws on Price Discrimination 1/

Price discrimination in its various forms in international trade would appear to be subject to one or more of the provisions of at least six Federal statutes.

Resumes of the statutes are set forth below. The Antidumping Act, 1921, is set forth first because it is the one most often invoked in connection with alleged dumping of imported articles and its provisions were apparently the only ones considered by the U.S. negotiators in relation to the Code. The remaining statutes are mentioned in the chronological order of their enactment in order that the reader may better sense the development of statutory controls on unfair methods of competition.

Antidumping Act, 1921, as amended

Special dumping duties are to be assessed under the Antidumping Act, 1921, as amended, when "a class or kind of foreign merchandise is being, or is likely to be, sold in the United States or elsewhere at less than its fair value" 2/ and "an industry in the United States

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1/ See pages i through xiv of the Appendix for the statutory texts.
2/ Hereafter referred to as "LTFV" sales.

is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States". Procedurally, the Act provides that the Secretary of the Treasury shall determine whether the first quoted condition exists. If the Secretary makes an affirmative determination, he informs the Tariff Commission which then acquires jurisdiction to determine whether one or more of the second quoted conditions exist. The Act directs the Commission to make its investigation and determination within the three-month period starting on the date of receipt of advice of the Secretary's determination. Affirmative determinations by both agencies, taken together, constitute a "finding" of dumping within the meaning of the Act (section 201(a)). The special dumping duty to be assessed is an amount equal to the difference between the purchase price and the foreign market value (or their approximate equivalents in some cases).

The basic concept of what constitutes injurious dumping under the Act has not changed since its enactment in 1921. Until 1954 the Secretary of the Treasury was responsible for administering the entire Act. However, in that year the responsibility for determining whether an industry was being injured, or likely to be injured, or prevented from being established, was transferred to the Tariff Commission. Moreover, the retroactive assessment of special duties was limited to entries, or withdrawals from warehouse, for consumption

made on or after the date which is 120 days prior to the date of receipt of a complaint by the Treasury Department. No substantive changes have been made in the original concepts of "industry" and "injury" as those words appeared in the original Act.

Other U.S. statutes

Act of 1890.--Section 1 of the Sherman Anti-Trust Act (15 U.S.C. 1) declares every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, to be illegal. Violators are subject to fines and imprisonment.

Act of 1894.--Section 73 of the Wilson Tariff Act of 1894 (15 U.S.C. 8) provides, among other things, that every combination, conspiracy, trust, agreement, or contract is declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations, either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement or contract is intended to operate in restraint of lawful trade or free competition in lawful trade or commerce. Criminal sanctions

apply for its enforcement. International price discrimination could be used to cause restraint of trade within the meaning of the Act.

Act of 1914.--Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) provides that unfair methods of competition in commerce among the several States or with foreign nations are declared unlawful. No injury test appears in the statute. The Act provides that the Federal Trade Commission may order violators to cease and desist and imposes penal sanctions on those who refuse to obey such orders. 1/

Act of 1916.--Section 801 of the Revenue Act of 1916 (15 U.S.C. 72) provides in effect that if there is predatory price discrimination in international trade, there shall be two sanctions. The injured party may recover treble damages for his injury and the persons who are responsible for such price discriminations shall be subject to a fine and/or imprisonment.

Act of 1930.--Section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) provides that, "in addition to any other provision of law," unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure "an industry", efficiently

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1/ The U.S. Supreme Court has held that the F.T.C. Act was designed to supplement and bolster the Sherman Act of 1890 -- to stop in their incipiency acts and practices which, when full blown, would violate that Act -- as well as to condemn as "unfair methods of competition" existing violations of the Sherman Act. F.T.C. v. Motion Picture Advertising Co., 344 U.S. 392; F.T.C. v. Brown Shoe Co., Inc., 384 U.S. 316.

and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States are declared unlawful. The statute requires absolute exclusion of such imports as the remedy in such cases. 1/

United States Obligations Under the GATT 2/

Article VI of the General Agreement on Tariffs and Trade recognizes that dumping is to be condemned and sets forth general principles relating to when dumping duties may be appropriately assessed. The principles in Article VI are generally in agreement with the underlying principles in the United States Antidumping Act but are not framed in identical language. The United States on October 30, 1947, bound itself to observe the principles set forth in Article VI to the extent that they are not inconsistent with existing legislation. 3/

On June 30, 1967, the United States became a party to the "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade." The first twelve articles of this Agreement consist of the "Anti-dumping Code" now commonly referred to as the

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1/ A similar section 316 in the Tariff Act of 1922 provided for the assessment of an additional duty of from 10 to 50 percent or absolute exclusion in extreme cases.

2/ Copies of Article VI of the GATT, the Protocol of Provisional Application of the GATT, and the Agreement on Implementation of Article VI of the GATT appear on pages xv through xxix of the Appendix.

3/ Article VI is in Part II of the GATT. Paragraph 1(b) of the Protocol of Provisional Application of the GATT states that Part II of the Agreement will be applied by the United States "to the fullest extent not inconsistent with existing legislation" (i.e., legislation existing on October 30, 1947).

"International Antidumping Code". The preamble to the Agreement states several purposes for the Code which are --

1. To recognize that anti-dumping practices should not constitute an unjustifiable impediment to international trade.

2. To recognize that anti-dumping duties may be applied against dumping only if such dumping causes or threatens material injury to an established industry or materially retards the establishment of an industry.

3. To interpret the provisions of Article VI of the GATT and to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation.

Each party accepting the Agreement agrees, pursuant to Article 14 thereof, to "take all necessary steps, of a general or particular character, to ensure, not later than the date of the entry into force of the Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of the Anti-Dumping Code." The United States, the United Kingdom, and Canada have signed the Agreement definitively and without reservation. 1/ Thus, the undertaking of the Agreement by the United States appears to supersede the Protocol of Provisional Application insofar as it applies to

1/ The United States signed the Agreement on June 30, 1967. It comes into force on July 1, 1968, pursuant to article 13 of the Agreement. The Agreement has also been signed without reservation by Belgium, Denmark, Finland, France, Germany, Italy, Japan, Luxemburg, the Netherlands, Sweden, and Switzerland, but is still subject to parliamentary ratification or other formal action in those countries. The European Economic Community is a signatory, subject to approval by its Council of Ministers. The Commission does not have information with respect to the status of implementation action in the countries signatory to the Agreement.

Article VI of the GATT and the United States is obliged internationally to abide by the Code beginning July 1, 1968, and to take all necessary steps to ensure the conformity of all its laws, regulations, and administrative procedures with the provisions of the Code.

Comparison of the Code with U.S. Statutes

For convenience, each article of the Code which relates to a special principle to be followed in a country's antidumping policies will be identified and then compared with the principles of the Anti-dumping Act, 1921, as amended, and to a limited degree with the other U.S. statutes dealing with price discrimination.

Article 1 - Duties

Article 1 states that dumping duties are to be assessed only under the circumstances provided for in Article VI of the GATT and that the provisions of the Code govern the application of Article VI, insofar as action is taken under anti-dumping legislation or regulations.

Article 2 - Dumping

Article 2 defines dumping as the introduction of a product into the commerce of another country "at less than its normal value." A product is sold at less than its normal value "if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." Basically, this statement of what constitutes dumping coincides with what constitutes "sales at less than fair value" within the meaning of the Anti-dumping Act. However, because of the use of terminology in the Code

which does not have identical counterpart terminology in the Act, and because there is no background material revealing the intent of the negotiators of the Code, it is not possible to make a precise comparison of the two provisions. The U.S. negotiators of the Code are of the opinion that Article 2 represents practice under the Act, an opinion in which the Secretary of the Treasury is in agreement. The Commission does not have first-hand experience (as does the Treasury Department) in the practical application of the Act for purposes of determining "foreign market values", "purchase prices", "constructed values", and "exporter's sales prices" which are defined therein and, therefore, is not in a position to report on the relative importance of the differences in terminology between Article 2 of the Code and the cited prices and values defined in the Act.

It will be observed that U.S. unfair trade statutes, other than the Antidumping Act, contain little or no specific criteria for determining whether there is price discrimination in a given situation. A comprehensive study of these statutes, their legislative history, and rulings made thereunder would need to be made to determine whether carrying out the Code necessitates any conforming amendments with respect to how price discriminations shall be determined.

Article 3 - The Injury Test

Article 3 of the Code contains criteria for determining that "injury" which justifies the assessment of special dumping duties. It states:

> A determination of injury shall be made only when the authorities concerned are satisfied that the dumped imports are demonstrably the principal cause of material injury or of threat of material injury to a domestic industry or the principal cause of material retardation of the establishment of such an industry. In reaching their decision the authorities shall weigh, on one hand, the effect of the dumping and, on the other hand, all other factors taken together which may be adversely affecting the industry. * * * In the case of retarding the establishment of a new industry in the country of importation, convincing evidence of the forthcoming establishment of an industry must be shown, for example, that the plans for a new industry have reached a fairly advanced stage, a factory is being constructed or machinery has been ordered. [Underscoring added for emphasis.]

Section 201(a) of the Antidumping Act states that the Commission shall determine --

> whether an industry in the United States is being, or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States.

The Act does not require a determination that dumped imports are adversely affecting an industry to a degree greater than any one or combination of other factors adversely affecting an industry before there can be an affirmative determination of injury, as is required by the Code. The Commission in making its determinations with respect to injury under the Act has not weighed the injury caused by such imports against other injuries that an industry might be suffering. The injury test has always been whether the imports at less than fair

value were causing, or were likely to cause, material injury, 1/ i.e., any injury which is more than de minimis. 2/

The Code criterion for injury 3/ is susceptible of two meanings. It states that a determination of injury shall be made only when the "dumped" imports are demonstrably the principal cause of material injury. This standard can be construed to mean that if the impact of "dumped" goods, considered alone, does not cause material injury there can nevertheless be a determination of material injury if the aggregate effect of all injurious factors is material injury and "dumping" is the principal causal factor. It would seem, however, that the negotiators intended that dumping duties be sanctioned only in those cases where the "dumped" goods are individually the cause of material injury and that such injury is greater than the injury caused by all other causal factors. The first interpretation would have the effect of making antidumping procedures under the Code more restrictive than the latter interpretation. The Antidumping Act is less restrictive

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1/ Commissioner Clubb agrees with the substance of this statement, but notes that his views on this matter are expressed in more detail in the decision on cast-iron soil pipe from Poland (32 F.R. 12925, Sept. 9, 1967).

2/ Some Commissioners, in making negative determinations, have explained that any existing injury, if material, was caused by factors other than "dumped" imports; but such explanations were not weighed against material injury caused by dumped imports for the purpose of making a negative determination.

3/ In this report the word "injury", for the sake of brevity, is used in the sense of injury or likelihood of injury, to an industry, or the prevention of the establishment of an industry, as those terms or their counterparts are used in the Antidumping Act or the Antidumping Code, unless otherwise specified.

than the Code under the first interpretation and more restrictive than the Code under the second.

The Tariff Commission has never had presented to it a serious claim that imports at less than fair value have prevented the establishment of an industry. It will be noted that the Code test for the comparable situation is not whether an industry "is prevented from being established" by reason of imports at less than fair value, but is whether the establishment of an industry is "materially retarded" principally by reason of imports at less than normal value. The Code states that a determination of material retardation shall not be made unless there is convincing evidence of the forthcoming establishment of an industry, "for example, that the plans for a new industry have reached a fairly advanced stage, a factory is being constructed or machinery has been ordered". This example, whether construed as three mutually exclusive tests or a single test that is met by one of two circumstances illustrative of that test, would seem to establish a more stringent qualification for a determination of a material retardation of the establishment of an industry under the Code than the present qualifications for a determination under the Act that an industry is prevented from being established. Moreover, the requirement that the subject dumped imports be the "principal" causation of

material retardation would further intensify the stringency of the Code requirements for such an affirmative determination. The factors affecting the ability of persons to establish a given industry may be quite numerous and exceedingly difficult to differentiate and "weigh" for the purpose of determining whether "dumped" goods are the "principal" causation of the persons' inability to establish the industry.

Article 3 of the Code states that, in evaluating the effects of the "dumped" imports on an industry, consideration shall be given to an examination --

> of all factors having a bearing on the state of the industry in question, such as: development and prospects with regard to turnover, market share, profits, prices (including the extent to which the delivered, duty-paid price is lower or higher than the comparable price for the like product prevailing in the course of normal commercial transactions in the importing country), export performance, employment, volume of dumped and other imports, utilization of capacity of domestic industry, and productivity; and restrictive trade practices. No one or several of these factors can necessarily give decisive guidance.

The Antidumping Act is silent as to how the effect of LTFV imports on an industry shall be evaluated. It requires the Commission to determine whether LTFV imports are injuring an industry in the United States. Since the Act contains no word of limitation concerning

the degree of injury to be considered, the word has been generally construed to mean injury in any degree greater than de minimis, i.e., more than trifling injury. Any injury more than de minimis is material injury. Moreover, the Act does not authorize the forgiveness of a material injury caused by LTFV imports in those cases where consideration of "all [other] factors having a bearing on the state of the industry in question" shows that the industry is in a healthy condition despite the effect of the LTFV imports. The Code concept of considering all factors having a bearing on the state of an industry in determining whether "dumped" imports are causing injury is different from the Commission's usual interpretation of the Antidumping Act. Under the Act, most commissioners have assessed the effects of LTFV imports on a domestic industry by weighing the extent to which such imports have penetrated U.S. markets, taken away customers, depressed market prices, or disrupted markets. Other factors may enter into consideration, but these are the basic factors generally considered.

Article 3 of the Code provides that "A determination of threat of material injury shall be based on facts and not merely on

allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause material injury must be clearly foreseen and imminent." The Act requires the Commission to determine whether imports at LTFV are likely to cause injury to an industry. Most commissioners seem to have used the test of whether a reasonably prudent man would anticipate that injury will occur in the foreseeable future. Other commissioners have used the test of imminent injury.

It may be noted that the Acts of 1890, 1894, and 1914 condemning unfair methods in competition, such as price discrimination in international trade (dumping), have no criterion that there be injury or likelihood of injury before the guilty parties are penalized. Judicial precedent seems to support rigid enforcement of these statutes, even to the extent of preventing a single sale at an unfair price level. The Act of 1916 imposes criminal sanctions on dumping if there is an "intent" to injure an industry. Proof of injury or likelihood of injury is not required for criminal prosecution. However, injury must be proven under that Act if treble damages are to be awarded to an industry. The Act of 1930 (section 337 of the Tariff Act of 1930) merely requires a finding that the imports involved in an unfair method of competition (price discrimination) have "the effect or

tendency" to destroy or substantially injure an industry. A "tendency" to cause injury appears to be a less stringent requirement than is likelihood of injury.

Article 4 - Scope of an Industry

Article 4 of the Code defines industry as follows:

(a) In determining injury the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products except that

(i) when producers are importers of the allegedly dumped product the industry may be interpreted as referring to the rest of the producers;

(ii) in exceptional circumstances a country may, for the production in question, be divided into two or more competitive markets and the producers within each market regarded as a separate industry, if, because of transport costs, all the producers within such a market sell all or almost all of their production of the product in question in that market, and none, or almost none, of the product in question produced elsewhere in the country is sold in that market or if there exist special regional marketing conditions (for example, traditional patterns of distribution or consumer tastes) which result in an equal degree of isolation of the producers in such a market from the rest of the industry, provided, however, that injury may be found in such circumstances only if there is injury to all or almost all of the total production of the product in the market as defined.

(b) Where two or more countries have reached such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the industry referred to in Article 4(a).

(c) [The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of production

in terms of such criteria as: the production process, the producers' realizations, profits. When the domestic production of the like product has no separate identity in these terms the effect of the dumped imports shall be assessed by the examination of the product of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.] 1/

The Code does not parallel U.S. precedent as to what constitutes the industry, or industries, to be considered under the Antidumping Act. For example, it only allows consideration of the effect of imports on one industry -- that which produces a product identical to the "dumped imports, or failing such production, that which produces another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration." 2/ Under the Antidumping Act, the Commission has considered whether "an industry" is being injured. There is no qualification as to the kind of industry nor the number of industries that might be affected by the imports under consideration. 3/

Paragraph (a) of article 4 of the Code, in defining industry, treats specially with those circumstances in which the industry for purposes of the Code may consist of a regional group of producers 4/

1/ Article 4(c) states that the provisions of Article 3(d) shall be applicable to Article 4. Accordingly, the language of 3(d) has been substituted therefor.

2/ Note use of term "like product" in Article 4, as defined in Article 2(b) of the Code.

3/ In Investigation No. AA-1921-24 the Commission considered the effect of imports of narrow glass panes on the flat glass industry, the jalousie glass louvre industry, and a jalousie window industry. In Investigation No. AA-1921-15, it considered the effect of imports of nepheline syenite on the domestic feldspar industry.

4/ This industry concept is commonly referred to as a "regional industry", "geographical industry" or "segmented industry" concept.

rather than all or virtually all producers in the contracting country producing the subject article. The conditions under which a regional industry concept may be employed in an injury determination under the Code are so narrowly defined that four out of five affirmative determinations by the Tariff Commission might not have been made had the Code been in effect when the determinations were made. Moreover, the four findings of dumping are currently in effect and, if continued beyond June 30, 1968, would appear to be inconsistent with the Code.

In one case, the Commission determined that LTFV imports into a particular geographical market area were injuring an industry composed of the producers of such product in that geographical area where virtually all of their production was sold. 1/ This case might have had the same result insofar as the Code standards for "industry" are concerned. In another case 2/ the LTFV imports were found to injure an industry composed of producers "in or adjacent to" the competitive market area in which the imports were sold, and in three cases 3/ such imports were found to injure an industry composed of producers "adjacent" to the competitive market area. The Code would limit a regional industry to all producers "within such a market" who "sell all or almost all of their production of the product in question in that market".

1/ Investigation No. 5 (cast-iron soil pipe from the United Kingdom).
2/ Investigation No. 19 (portland cement from Belgium).
3/ Investigations Nos. 16, 22, and 25 (portland cement from Sweden, Portugal, and the Dominican Republic).

The Code treats with a regional industry as being almost wholly contained within a "competitive market area", a circumstance which in the Commission's experience rarely exists. If the cited cases are any indicia, four out of five cases do not appear to fit the Code standard of regional "industry". Moreover, the Code would require that all or almost all of the producers within the subject market area be injured before there could be an affirmative determination of injury under its provisions. The Commission has never limited its affirmative determinations of injury to those cases where "all or almost all of the producers" were injured. We are not in a position to state what the outcome of the Commission's past affirmative determinations might have been under such a limitation of the Code.

In recent years, cases have arisen where LTFV imports have been concentrated in competitive market areas which were served to a significant degree by virtually all domestic producers. The concentration of sales of such imports in certain competitive market areas were found to cause, or were found likely to cause, injury to an industry composed of all domestic producers of such product even though a sizable portion of the total producers may not have individually experienced material injury nor were likely to experience material injury within the foreseeable future.[1/] Such determinations were based on the concept that an injury to a part of the industry is necessarily an injury to the whole industry.

1/ Investigation No. 32 (chromic acid from Australia), and No. 50 (cast-iron soil pipe from Poland).

The Code does not treat specially with situations of the kind just described. If an industry consisting of all producers were to be adjudged injured only in those cases where the injury parallels that required with respect to regional industries, perhaps only a few of the affirmative determinations would have been made had the Code been the prevailing law at the time the determinations were made. On the other hand, if the Commission's contemporary method of determining whether there is injury falls within the terms of Article 4, it would seem that the contemporary method could be used to avoid the limitations on the use of a regional industry concept.

Article 4(b) of the Code specifies circumstances under which an industry must be considered as consisting of all producers in two or more countries. The provision appears to relate solely to common market unions such as the European Economic Community. Unless the United States forms such a union, Article 4(b) would seem to have no relevancy to the Act.

The earliest three Federal statutes cited in this report do not specify that an industry be injured before remedial action is taken. The Act of 1916 specifies that "Any person injured in his business or property" by reason of predatory dumping may sue for treble damages. Thus, that Act does not limit its remedies to situations where there is injury to a nationwide industry or an exceptional regional industry.

It would appear that each of these statutes are not as limited in affording remedies against dumping as is the Code when considered in light of the "industry" criterion.

Article 5 - Initiation of Investigations of Dumping

Article 5 of the Code states in effect that dumping investigations shall normally be initiated upon complaint by the industry producing the like product, 1/ but that in unusual circumstances the Secretary of the Treasury may initiate such an investigation. In either event, the investigation must not be initiated until there is evidence at hand of sales at LTFV and injury and a simultaneous consideration of such evidence to determine whether an investigation is warranted. After the initiation, if any, such evidence should be considered simultaneously to determine whether there are sales at LTFV and injury.

The Act would seem to compel the Secretary of the Treasury to initiate an investigation whenever he has reason to suspect sales at less than fair value by reason of any information submitted to him. The Act does not qualify the source of such information.

The Act vests jurisdiction in the Secretary of the Treasury to determine whether there are sales at LTFV. Jurisdiction to determine whether there is injury is vested in the Tariff Commission. The

1/ That is, a producer of a product identical to the LTFV product or, failing such production in the United States, a producer of another product which has characteristics closely resembling those of the LTFV product.

latter jurisdiction would seem to arise only when the Secretary of the Treasury has advised the Tariff Commission of an affirmative determination of sales at LTFV. Thus, a question arises as to whether there is authority under the Act to delay initiating an investigation of alleged dumping in order to comply with the mandatory simultaneity prerequisites of the Code for initiating an investigation. Moreover, a question also arises as to whether the Secretary of the Treasury and the Tariff Commission have authority under the Act to comply with the permissive direction of the Code that final decisions with respect to sales at LTFV and injury be made simultaneously.

Under the Act, the Commission has examined primarily those factors which show the effect that the "margin of dumping" 1/ has on a domestic industry. The Code concept of simultaneity in the dual determinations of "dumping" and "injury" suggests that the negotiators had in mind a mere assessment of the injury caused by the presence of LTFV goods in the marketplace without regard to whether the "margin of dumping" has had any material effect in causing injury. This intent seems to be borne out by Article 3(b) of

1/ "Margin of dumping" is an amount equal to the difference between the home market price of the foreign article and the lower price for which it is sold for export to the United States. It is sometimes characterized as an "unfair discount". The amount of the margin in a particular case is determined by the Treasury Department and is accepted without review by the Tariff Commission.

the Code which specifies certain factors to be weighed in determining whether there is injury.

The Code in demanding simultaneity of consideration creates an anomalous result. The separation of function between the Treasury Department and the Tariff Commission embodied in the Act permits a logical order for determining whether an unfair act exists and, if so, whether such act injures an industry. Until a margin of dumping has been determined, it is obvious that no appraisal can be made of its effect. When a determination of sales at LTFV is received from the Treasury Department, it has been the Commission's experience that a number of preliminary steps must be taken before consideration can be given to the injury determination. The Commission generally needs to know approximately when sales at LTFV began, the margins of difference, the dates of any changes that may have occurred in such margins, the conditions existing in the domestic markets where the LTFV goods are being sold, the extent of such imports, etc. Procedurally, these preliminary steps require from one to two months to complete; there-

after public hearings are usually held to give opportunity to all interested parties to submit facts and points of view. In other words, effective simultaneity in any real sense is not procedurally feasible or logical.

Article 5(c) of the Code provides that a dumping complaint must be rejected if there is not sufficient evidence of injury to proceed with the case. Inasmuch as the Act vests sole authority in the Commission to make injury determinations, and as such authority does not become viable until the Commission has received an official determination of LTFV sales by the Secretary of the Treasury, it does not seem that either the Treasury or the Commission has authority to review complaints to determine whether sufficient evidence of injury has been submitted therewith for purposes of rejecting the complaint.

Under most of the statutes, including the Antidumping Act, dealing with unfair methods of competition, the responsibility for initiating an investigation is placed upon the administering agency. The Code, on the other hand, seems to be designed to discourage the initiation of investigations by an agency and would supplant the statutory procedures with a complaint procedure.

Article 6 - Right to be Heard - Notice of Decision and Reasons Therefor

Article 6 of the Code deals with the rights of interested parties to be heard and to be informed to the extent reasonably practicable of all facts considered in a dumping case.

Article 7 - Forgiveness of Dumping

Article 7 of the Code permits a country to close a case without assessing a special dumping duty in those cases where the exporter agrees to cease exporting to the investigating country or agrees to stop exporting at LTFV. This provision is in harmony with a recently established practice of the U.S. Treasury Department under the Act. The Department, when it finds sales at LTFV, publishes a "tentative" determination of sales at LTFV. If the exporter promises to raise his prices to fair value or to cease exports to the United States, the Department makes a final determination of no sales at LTFV and, therefore, does not refer the matter to the Commission to determine the effect of such imports on domestic industries. It is estimated that under such a practice the average exporter can sell his goods at LTFV in the United States for approximately two years 1/ with impunity insofar as the effectiveness of the Act is concerned. Thus, sporadic dumping would not appear to be effectively stopped under this practice.

The latter part of Article 7 provides that an exporter of goods sold at LTFV is entitled to have a formal determination made as to whether his goods are causing injury in the importing country without having to revise his prices or to cease exporting such goods. This is harmonious with the Act. Not all "LTFV" prices are literally unfair within the domestic unfair trade law concepts and the Commission has applied this philosophy to the Act.

1/ Sales at less than fair value are usually not satisfactorily proven to the point of a "tentative" determination until after imports have entered the United States for a period of about two years.

None of the unfair trade statutes cited in this report specifically provide a mechanism for a violator of the statute concerned to avoid the remedial or penal actions directed to be taken thereunder by his agreement to conform to the law after he is caught. The Code in this respect does not appear to conform with any of the statutes.

Article 8 - Dumping Duties

Article 8 of the Code deals with the imposition of a special dumping duty. Paragraph (a) of the Article provides that the assessment of such a duty is not mandatory but permissive. It requires that such duties not be assessed in excess of the actual margin of difference and expresses a desire that the amount be less than the margin if such lesser duty would be adequate to remove injury. Under the Act, assessment of a duty equivalent to the margin is mandatory.

Paragraph (e) of article 8 of the Code provides that if a regional industry is involved, dumping duties shall be assessed only on imports going into the regional area. Moreover, even these duties shall not be assessed if the exporter gives assurance that he will "cease dumping in the area concerned". Under these provisions of the Code it would seem that the exporter for some years may elude special dumping

duties by jumping from one market area to another when the duties become imminent in the one area. These provisions of the Code appear to be in conflict with the Act. In addition, a question arises as to whether section 8(1) of Article I of the Constitution, which requires a uniform levy of duties, would permit the assessment of dumping duties on this basis. (See Ellis K. Orlowitz Company v. United States, 50 C.C.P.A. 36 (C.A.D. 816).)

Since the Code would only permit the assessment of special dumping duties as a deterrent to price discriminations in international trade, the question arises as to whether other remedies and penalties provided for in the unfair trade statutes of the United States must be changed if there is to be a conformity with the Code.

Article 9 - Revocation of Dumping Findings

Article 9 of the Code provides in effect that a finding of dumping shall be terminated when it ceases to serve its intended purpose. The Act contains no special provision for the termination of a finding thereunder. There are cases in which meritorious reasons exist for revoking dumping findings. The Secretary of the Treasury has promulgated a regulation (19 CFR 14.12) establishing a procedure under which a dumping finding will be modified or revoked if a change in circumstances or practice has obtained for a substantial period of time, or other reasons obtain which establish that the basis for the dumping finding no longer exists with respect to all or a part of the merchandise covered thereby.

The imposition of penal sanctions and the awarding of treble damages under the other unfair trade laws are one-time remedies not comparable to dumping duties. The matter of revocation does not arise (except for mistakes). The remedies are, however, always available against every single infraction should such a practice be resumed. Articles once refused entry under section 337 of the Tariff Act of 1930 continue to be so excluded until the President finds "that the conditions which led to such refusal of entry no longer exist."

Article 10 - Interim Safeguards (provisional measures) Against Suspected Dumping

Article 10 of the Code prohibits imposing any interim safeguards which would offset suspected dumping margins until the contracting country has made a preliminary decision that there are sales at LTFV and it has in hand adequate evidence of injury. Thereafter, interim safeguards may only be imposed with respect to prospective entries of dumped goods.

The Act requires no evidence of injury before imposing interim safeguards. It provides that when the Secretary of the Treasury "has reason to believe or suspect", from the invoice or other papers or from information presented to him or to any person to whom authority under that Act has been delegated, that there are sales at LTFV, he "shall authorize * * * the withholding of appraisement reports as to such merchandise entered, or withdrawn from warehouse, for consumption, not more than 120 days before the question of dumping has been raised."

Once appraisement reports are ordered withheld, such merchandise is not released from customs custody except under bond with surety guaranteeing the payment of dumping duties should there be an affirmative finding of dumping.

Inasmuch as the Act vests with the Tariff Commission sole authority to make determinations of injury and as this authority does not include the making of tentative or interim determinations of injury, the conditions of the Code with respect to provisional or interim measures could not be fulfilled under the Act until a finding of dumping had been made. Thus, it would appear that the fulfillment of the conditions for provisional measures under the Code would preclude the taking of any provisional or interim measures by the United States under the Act.

If the Act were to be amended to authorize preliminary determinations of injury, there would be a further problem of complying with paragraph (d) of Article 10 of the Code which states that no interim safeguard may be imposed "for a period longer than three months or, on decision of the authorities concerned upon request by the exporter and the importer, six months." Under the Act, the Secretary of the Treasury is to impose safeguards at the moment he "has reason to believe or suspect" sales at LTFV. Thereafter, such imports are released only under bond guaranteeing the payment of all duties lawfully due on the goods. With respect to pending cases, the average period of withholding appraisement is approximately one year. This

average, which is not unusual, indicates that U.S. customs officers are not able to complete their pricing investigations under the Act in time to comply with the three- or six-month limitation under the Code on interim safeguards.

Article 11 - Retroactivity of Dumping Duties

Article 11 of the Code specifies the conditions under which dumping duties may be assessed retroactively. Considered alone, it would seem to authorize the retroactivity specified under the Act. However, as indicated below, retroactivity is dependent in large measure upon the extent to which interim safeguards are authorized.

The authority to assess dumping duties on a retroactive basis under the Act has been the subject of much criticism by some of our principal trading partners, most notably by the United Kingdom which provided the major impetus for the negotiation of the Code. As a matter of practice, retroactive assessments of dumping duties are rarely made in the United States under the existing Act. It is the practice of the Treasury Department not to authorize the withholding of appraisement of entries until that Department has made a tentative determination that there are sales at LTFV. This determination is usually made from one to two years after the receipt of a complaint. During the course of Treasury's investigation, customs officers habitually make prompt appraisements of virtually all entries of the suspect goods so that few, if any, entries of such imports are affected by a dumping finding except those made after the date of the withholding order.

Article 12 - Third Country Dumping

Article 12 of the Code permits countries at their discretion to afford protection against third country dumping (e.g., if one country sells its product at LTFV in the United States and causes injury to the industry of a third country which exports the like product to the United States, the Code would approve the assessment of a dumping duty by the United States on the dumped goods). The Antidumping Act does not authorize the assessment of dumping duties in such cases.

Implementation of Code by the United States

As previously stated, article 14 of the Agreement containing the Code provides that --

> "Each party to this Agreement shall take all necessary steps, of a general or particular character, to insure, not later than the date of entry into force of the Agreement [July 1, 1968] for it, the conformity of its laws, regulations and administrative procedures with the provisions of the Anti-Dumping Code."

Thus, insofar as the Agreement is concerned, the question raised for the United States is what, if any, steps must be taken with respect to its laws, regulations, and administrative procedures if they are to conform with the provisions of the Code.

It is well settled that the Constitution does not vest in the President plenary power to alter domestic law. The Code, no matter what are the obligations undertaken by the United States thereunder

internationally, cannot, standing alone without legislative implementation, alter the provisions of the Antidumping Act or of other United States statutes. As matters presently stand, we believe that the jurisdiction and authority of the Commission to act with respect to the dumping of imported articles is derived wholly from the Antidumping Act, and 19 U.S.C. 1337.

This, of course, is not to say that the provisions of the Code may not prompt useful reconsideration of the procedures promulgated under existing law to conform them with the Code to the extent necessary, but domestic statutory law is the sole authority for making changes in such procedures and any changes made therein must be wholly compatible with the substantive and procedural provisions enacted in such law.

The Commission does not contemplate making any changes in its Rules of Practice and Procedure, 1/ but it is noted that the Treasury Department does contemplate changes in its Customs Regulations by reason of the prospective effectiveness of the Code. On October 28, 1967, the Treasury Department issued notice of its proposed amendments of the Customs Regulations relating to procedures under the Antidumping Act (32 F.R. 14955).

1/ Parts 203 and 208 of the Commission's Rules relate specifically to investigations under sections 1337 and 160 (et seq.) of title 19 of the United States Code.

ADDITIONAL COMMENTS OF COMMISSIONER CLUBB

In my judgment a basic question raised by S. Con. Res. 38 is what effect the Tariff Commission must give to the International Antidumping Code (hereinafter the "Code"), 1/ assuming that it goes into effect internationally as scheduled on July 1, 1968, without the benefit of implementing legislation in the United States. The minority state that in such circumstances the Commission will be

1/ The Code is an executive agreement interpreting Article VI of GATT. Article VI, which relates to antidumping and countervailing duties has been in force since 1947, but signatory countries are only required to abide by it to the extent that it is not inconsistent with then existing legislation. The Code sets out more detailed rules regarding when antidumping measures are permitted. In addition, it requires that existing legislation be brought into conformity with it. In this connection, the preamble to the Code states,

> "* * *
>
> Desiring to interpret the provisions of Article VI of the General Agreement and to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation;"
>
> The signatories to this Code agree that:
>
> "1. The imposition of an anti-dumping duty is a measure, to be taken only under the circumstances provided for in Article VI of the General Agreement."

In the Final Provisions of the Code each signatory country agrees to

> "take all necessary steps . . . to ensure, not later than the date of the entry into force of the agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of the Anti-Dumping Code." Code, Article 14.

required to apply the Code except where it is inconsistent with the Antidumping Act of 1921 (hereinafter the "Act"), 2/ in which case the Act would prevail. The Vice Chairman, Commissioner Culliton and I take the position that the Commission is powerless to apply the Code even after it goes into effect internationally until Congress implements it, or it is approved by Congress pursuant to the Treaty provisions of the Constitution. Since both the majority and minority have dealt only briefly with this point, and since it appears to me to be a fundamental issue, it might be worthwhile to explain my views on it in more detail.

At the outset it might be noted that there is nothing in the Code itself which indicates that it is intended to be applied as law in any of the signatory countries. Instead each government has committed itself to bring its laws into conformity with the Code, and the negotiators for the United States have indicated that in their best judgment United States law is already consistent, so no changes are required. I see nothing in this which indicates an intention that the Code itself be applied as domestic law. Nonetheless, responsible sources have indicated that they feel that the Code should be given what amounts to the force and effect of law,

2/ The Commission's responsibilities relating to dumping were imposed upon it by Congress in the Antidumping Act of 1921, as amended. That Act now provides that when the Commission is advised by the Treasury Department that an imported article is being sold at less than fair value (i.e., dumped)

> ". . . the (Tariff) Commission shall determine . . . whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation . . . (of dumped) merchandise."

or "near law." For example, a Treasury Department memorandum refers to the necessity of construing two "laws" (meaning the Act and the Code) to be consistent. A similar comment is made in the minority report here. Accordingly, it becomes necessary to determine what effect the Code should have on future Commission proceedings.

I. Status of the Code under United States Law

Unlike statutes and treaties 3/ approved by both the legislature and the executive, the status of executive agreements such as the Code, which are entered into by the executive alone, has not always been clear. 4/

It appears to be agreed, however, that an executive agreement has no effect as domestic law if it is inconsistent with a federal statute. 5/ Accordingly, it is necessary to determine what amounts

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3/ Statutes and treaties are provided for in the Constitution which states,

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land;" U. S. Const. art. VI, cl. 2.

4/ See, McClure, International Executive Agreements (1941). McDougal and Lans, Treaties and Congressional-Executive or Presidential Agreements. Interchangeable Instruments of National Policy, 54 Yale L. J. 181 (1945).

5/ In this connection the Restatement states,

> "Effect on Domestic Law of Executive Agreement Pursuant to President's Constitutional Authority
>
> (1) An executive agreement, made by the United States without reference to a treaty or act of Congress, conforming to the constitutional limitations stated in

to an "inconsistency" for this purpose. One theory appears to be that after Congress has acted with respect to a matter it has occupied the field, and thereafter any executive agreement in the same area is inconsistent, even if it merely provides different means to achieve the same objectives, or if it fills holes which Congress left void. Another is that the Code is fundamentally in conflict with the Act if it in effect transfers the responsibility for interpreting the Act from the Commission to the executive.

A. The Occupied Field

In the only case involving this issue, United States v. Guy W. Capps, Inc., 204 F. 2d 655 (4th Cir. 1953), aff'd on other grounds 348 U. S. 296 (1955), the Court apparently followed this theory. There the Court noted that the Congress in the Agriculture Act of 1948 had provided a procedure for the prevention of agricultural

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5/ Continued

§ 121, and manifesting an intention that it shall become effective as domestic law of the United States at the time it becomes binding on the United States

(a) supersedes inconsistent provisions of the law of the several states, but

(b) does not supersede inconsistent provisions of earlier acts of Congress."

Restatement (Second) of the Law of Foreign Relations of the United States, § 144 (1965).

imports harmful to domestic price support programs. Ignoring this procedure for preventing excessive imports of eating potatoes, the President instead entered into an executive agreement with Canada to accomplish the same purposes by different means. The executive agreement provided in effect that Canada would not permit potatoes to be shipped to the United States unless the United States buyer had agreed not to resell them for table use. When a United States buyer violated this agreement, the government brought suit, claiming damages for breach of contract. On appeal from a judgment for the buyer, the Court of Appeals for the Fourth Circuit held that the resale provision of the contract was unenforceable because it was based on a void executive agreement. On this point the Court said

> "Since the purpose of the agreement as well as its effect was to bar imports which would interfere with the Agricultural Adjustment program, it was necessary that the provisions of this statute be complied with and an executive agreement excluding such imports which failed to comply with it was void.
>
> "We think that whatever the power of the executive with respect to making executive trade agreements regulating foreign commerce in the absence of action by Congress, it is clear that the executive may not through entering into such an agreement avoid complying with the regulation prescribed by Congress. Imports from a foreign country are foreign commerce subject to regulation, so far as this country is concerned, by Congress alone. The executive may not bypass Congressional limitations regulating such commerce by entering into an agreement with the foreign country that the regulation be exercised by that country through its control over exports. Even though the regulation prescribed by the executive agreement be more desirable than that prescribed by Congressional action, it is the latter which must be accepted as the expression of national policy." 204 F. 2d at 659-60.

Based on the theory of the Capps case it could be argued that once the Antidumping Act of 1921 was enacted, Congress had occupied the field of antidumping law in the United States, and the executive was thereafter without power to provide alternatives, even though they might be consistent alternatives. Under this theory the Commission would be unable to apply the Code as domestic law.

B. Basic Conflict between the Act and the Code

Even if one does not accept the theory of Capps, however, it seems to me that there would be a fundamental inconsistency between the Act and the Code if the Commission treated the Code as domestic law. This becomes apparent when the function of the Commission under the Act alone is compared with its function under the Act and the Code combined. Under the Act, the Commission has the sole administrative responsibility for interpretation of the Act; if both are applied together, this responsibility is shared with, and controlled by, the executive. The Act provides that

> ". . . the Commission shall determine . . . whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of . . . (dumped) merchandise into the United States." 19 U.S.C. § 160 (a) (1964). (Emphasis supplied.)

The determination to be made by the Commission involves not only the finding of facts, but also the interpretation of the Act. If the Commission treats the Code as law, the Commission would be

bound to accept the interpretation written into the Code, even though others might seem more reasonable. Similarly, an interpretation already adopted by the Commission as the most reasonable one might have to be discarded in favor of the interpretation of the executive embodied in the Code. Finally, any future Commission interpretation of the Act which was not favored by the executive, could be changed by a subsequent amendment to the Code. This would appear to be in direct conflict with the injury provisions of the Act which lodge the responsibility for interpreting the Act in the Commission.

The lack of authority in the executive branch to bind the agencies and courts to a particular interpretation of United States law apparently has long been recognized. Thus Hackworth reports the following diplomatic correspondence from 1910:

> "The Mexican Government requested an exchange of notes interpreting a provision of the extradition treaty between Mexico and the United States in the sense that authentication of extradition papers by the respective consuls would be sufficient. Secretary Knox replied:
>
> > The department regrets to say that it deems it inadvisable to exchange notes in the sense proposed in your note, since even if the department did exchange notes setting forth an understanding as suggested by you, such notes would not, so far as the internal affairs of this Government are concerned, have the status either of a treaty or of a law, but would be merely an executive interpretation of the treaty and of the Federal statutes. This would not be binding upon the courts of this country, which might at any time disregard the agreement incorporated in the notes, in which case it would not be possible for the department to control their decision. This

> is particularly true, since it is not entirely clear to the department that the contention which you make regarding the meaning of Article VIII of the treaty is the only one which may properly be placed upon it. . . . Therefore it would appear that such regulations as you suggest would, in order to be properly effective in this country, have to be made either by means of new legislation or by means of a formal treaty.
>
> The Mexican Ambassador (De la Barra) to the Secretary of State (Knox), no. 522B, Mar. 2, 1910, and Mr. Knox to Mr. de la Barra, no. 216, Apr. 13, 1910, MS. Department of State, file 12208/4; 1910 For. Rel. 731-733." 5 Hackworth, Digest of International Law 399 (1943).

The basic conflict between the Act and the Code which would arise if the Commission treated the Code as law, lies in the subtle, but necessarily implied, transfer of at least a portion of the interpretative authority from the Commission, where Congress placed it, to the executive. Since this conflict would arise in any case in which the Commission attempted to apply the Code, it seems clear that, if the Code does not receive legislative approval, the Commission must continue to apply the provisions of the Act alone.

II. Should the Code be Applied by the Commission even though It Is Not Domestic Law?

It is argued that, even if the Code does not have the constitutional underpinnings necessary to become law domestically, it nonetheless should be applied by the Tariff Commission to future antidumping cases. This argument proceeds on two separate theories.

A. The Authoritative Interpretation Theory

First, it is contended by some outside the Tariff Commission that the Commission is part of the executive branch, and since the

President is the head of that branch, any interpretation which he places on a statute is binding upon all segments of the executive branch. Accordingly, since the Code represents the President's interpretation of the Antidumping Act of 1921, it is argued that it is binding upon both the Treasury Department and the Tariff Commission, even though it might not be binding on the courts.

Feeling as I do that the Tariff Commission is not part of the executive branch for this purpose, I reject this argument.

B. The Rule of Construction Theory

Second, it is argued that, even if the Code is not binding on the courts or the Tariff Commission so as to change domestic law, well established rules of statutory construction require that the Commission construe the Antidumping Act in such a manner that it does not conflict with the Code. This argument has been made both by the Commission minority and by the Treasury Department, although on somewhat different grounds. The Treasury Department asserts that

> "It is concluded . . . that no provision of the International Anti-Dumping Code requires implementation in such a way as to be in conflict with United States law. In reaching this conclusion this memorandum follows the customary rule of construction that where alternative interpretations of two 'laws' (in this case a statute and an Executive Agreement) are possible, that interpretation should be followed which will avoid a conflict. It is our conclusion, after a thorough study of the Code and comparison of its provisions with the Anti-Dumping law, that the Code is consistent with the U. S. statute." Memorandum reportedly transmitted by the Treasury Department to Senator Hartke under cover of a letter dated September 20, 1967. (Emphasis supplied.)

I think the rule of construction referred to is not applicable here.

The goal of any rule of statutory construction is to effectuate the intent of Congress. 6/ Thus, when Congress passes a law which appears on its surface to conflict with an unrepealed existing law, the courts assume that Congress was aware of the earlier Act, and since it was not repealed, the courts assume that Congress intended them both to be applied at the same time. Accordingly, in order to effectuate the intent of Congress the courts strive to find an interpretation which will give effect to both.

Such a rule obviously has no application here, however, because one of the "laws" involved is not a law at all, but a unilateral act

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6/ One authority has stated this proposition as follows:

> "the application of the law according to the spirit of the legislative body remains the principal objective of judicial interpretation. Some have emphasized the words of the legislature themselves and have insisted on a literal interpretation as the safest means of determining legislative intent. Others have used the 'equity of the statute' and when necessary have disregarded the words in order to follow legislative intention. Still others have relied heavily on extrinsic evidence found in the legislative history of prior enactments, the procedure through which the immediate statute passed, its committee reports, and its interpretation by administrative officials, in order to determine the intent of the legislature. None of these methods or the numerous subsidiary canons of interpretation can be criticized if they in fact reflect the intent of the legislature but none can be supported when they result in a finding of legislative intent which did not in fact exist with the legislature.

. . . . . .

2 Sutherland, Statutory Construction, 315, § 4501 (3d ed. 1943).

of the executive branch. Accordingly, there is no basis for a presumption that Congress intended both to apply. Moreover, since the executive agreement was made 46 years after the Act was passed, there is no ground for presuming that Congress had the Code in mind when it passed the Act, and intended them to be construed harmoniously.

Second, the rule of construction argument is supported by the Commission minority on slightly different grounds. The minority maintains that in future cases the Commission should

> "apply the principles of American law to the task of interpretation of the Act . . ., including those principles relating to interpreting the Act so as to avoid inconsistency between it and the international obligations of the United States. (Emphasis supplied.)

There appears to be a court practice, supported by the authorities cited by the minority, to construe acts of Congress so that they do not conflict with the "law of nations."[1] This rule of

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[1] However, none of the authorities cited by the minority support the broader proposition that a statute should be interpreted to avoid inconsistency between it and all international obligations of the United States. Indeed, it does not appear that any of the cases cited involved an executive agreement, or even a treaty. On the contrary, in each case the court appears to have construed an act to conform with a customary rule of international law in existence when the Act was passed. Thus, the minority cites Murray v. The Schooner Charming Betsy, 6 U.S.(2 Cranch) 64 (1804), wherein the Court held that a law providing for the forfeiture of vessels owned by U.S. citizens engaged in U.S.-French trade, did not authorize the seizure of a vessel owned by an American expatriate who had since sworn allegiance to Denmark. In the course of the opinion Chief Justice Marshall said,

> "It has been very properly observed, in argument, that the building of vessels in the United States for sale to neutrals,

construction, like the one discussed above, is designed to effectuate the intent of Congress. It is based on the theory that when Congress enacts a statute it is aware of the requirements of international law, and does not intend to violate it. Accordingly, in construing the Antidumping Act of 1921 it might be proper to assume that Congress intended it to conform to the requirements of international law in existence at that time, but not to an executive agreement made 46 years later.

7/ Continued

> in the islands, is, during war, a profitable business, which congress cannot be intended to have prohibited, unless that intent be manifested by express words, or a very plain and necessary implication. It has also been observed, that an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains, and consequently, can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country." 6 U. S. (2 Cranch) 64, 118.

The minority cites Lauritzen v. Larsen, 345 U. S. 571 (1953), where the Court held that the Jones Act did not cover an alien seaman on an alien ship in alien waters. The Court noted that the usual rule of international law is that the law of the flag state governs the internal affairs of a ship. In this connection the Court said,

> "Congress could not have been unaware of the necessity of construction imposed upon courts by such generality of language and was well warned that in the absence of more definite directions than are contained in the Jones Act it would be applied by the courts to foreign events, foreign ships and foreign seamen only in accordance with the usual doctrine and practices of maritime law." 345 U. S. 571, 581.

But even if the rule were otherwise applicable, it seems clear that the Code is not the type of "international law" which will require a harmonious construction. In this connection the Restatement defines international law as "those rules of law applicable to a state . . . that cannot be modified unilaterally by it." Restatement, § 1. This definition appears to embody the usual distinction made between customary and conventional international

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7/ Continued

Finally, the minority cites McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U. S. 10 (1963), a case in which the Court held that the National Labor Relations Act was not intended by Congress to cover alien seamen on foreign flag vessels. In holding that U. S. law did not apply, the Court concluded,

> "We therefore conclude, . . . that for us to sanction the exercise of local sovereignty under such condition 'in this delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed!" 372 U. S. 10, 21-22.

In each of these cases the conflict was between a possible interpretation of an Act of Congress and a long established rule of customary international law, and in each case the Court concluded that Congress should not be presumed to have intended to violate the rule in the absence of some clear expression of that intent. Accordingly, the Court chose a construction which brought the Act into conformity with the rule.

I find nothing in these cases which supports the proposition that the interpretation of an Act of Congress is to be limited by an executive agreement entered into later in time.

law. 10/ Since the Code is an international agreement (conventional international law), it can be unilaterally modified by any signatory nation by ceasing to be a party to it. Accordingly, it seems clear that the Code is not "international law" as that term is used in the Restatement, and comments therein to the effect that statutes are to be construed in a manner consistent with international law are not applicable.

Conclusion

In my judgment the following conclusions about the relationship between the Act and the Code appear to be warranted:

(1) The Code does not have the force and effect of law in the United States.

(2) There is no rule of statutory construction which requires the Commission to construe the Act to be in harmony with the Code.

10/ Thus, Hackworth states,

"Conventional international law, so-called, is not to be confused with customary international law. While a convention--such as certain of the Hague conventions--may, and often does, embody well-established international law, it may at the same time include provisions which are not established international law but which the contracting parties agree should govern the relations between them. The convention as such is binding only on the contracting parties and ceases to be binding upon them when they cease to be parties to it. Those provisions of a convention that are declaratory of international law do not lose their binding effect by reason of the abrogation of or withdrawal from the convention by parties thereto, because they did not acquire their binding force from the terms of the convention but exist as part of the body of the common law of nations. Provisions of conventions that are not international law when incorporated therein may develop into international law by general acceptation by the nations." 1 Hackworth, Digest of International Law, 17 (1940).

A final question is whether the United States will be in violation of the Code, if the Commission continues to apply the Act, but this question must ultimately be answered by the Contracting Parties. If the results reached by the Commission in applying the Act after the Code goes into effect internationally are very different from those which the Contracting Parties expected under the Code, presumably the Contracting Parties will complain to the President that the United States is not abiding by the Code. At that time questions of how and whether to amend the Act or the Code may have to be faced.

Separate Views of Chairman Metzger and Commissioner Thunberg

S. Con. Res. 38 upon adoption would resolve, "That it is the sense of Congress that --

"(1) the provisions of the International Antidumping Code, signed at Geneva on June 30, 1967, are inconsistent with, and in conflict with, the provisions of the Anti-Dumping Act, 1921;

"(2) the President should submit the International Antidumping Code to the Senate for its advice and consent in accordance with article II, section 2, of the Constitution of the United States; and

"(3) the provisions of the International Antidumping Code should become effective in the United States only at the times specified in legislation enacted by the Congress to implement the provisions of the Code."

Paragraph (1) of S. Con. Res. 38 would resolve that it is the sense of the Congress that the provisions of the International Antidumping Code, signed at Geneva on June 30, 1967, "are inconsistent with, and in conflict with, the provisions of the Anti-Dumping Act, 1921".

The "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade" of June 30, 1967, was accepted on that date by signature on behalf of the United States of America, to enter into force for each party accepting it on July 1, 1968 and is referred to as the "International Antidumping Code".

Article 14 of the Code states that, "Each party to this Agreement shall take all necessary steps, of a general or particular character, to ensure, not later than the date of the entry into force of the Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of the Anti-Dumping Code." The Code itself, therefore, does not purport to change domestic laws in any country. If a country is of the view that there is a need to make changes in its domestic law in order for it to conform with Code requirements, any such changes would have to be achieved through domestic law changes in the usual manner -- in the United States through Congressional action amending the Anti-Dumping Act.

It is our understanding that the Executive Branch has been and is of the view that the provisions of the Code and the Act are not inconsistent with, and in conflict with, each other. During the course of negotiation of the Code prior to June 30, 1967, representatives of the Executive Branch met with the Commission to discuss the provisions of the Code then under international negotiation. The then-Chairman of the Commission expressed the view that the Code and the Act were not inconsistent. He did not purport to speak for the Commission as a whole. The Commission was not requested to, and did not, take an official position on that question, nor did any Commissioner volunteer his views at that time.

The functions of the Tariff Commission under the Anti-Dumping Act, 1921, assigned to it since 1954, are to determine, within three months after the Secretary of the Treasury determines that a class or kind of foreign merchandise is being, or is likely to be, sold at less than its fair value, "whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States."

The procedure pursuant to which the Commission performs these functions does not appear to be affected by any provision of the Code. The Commission can continue in the future as it has in the past to make its determinations within three months of receiving the Secretary of the Treasury's less than fair value determination, following the procedures established by the Commission's Rules of Practice and Procedure.

We have examined the provisions of the Code relating to injury, causation, and the definition of industry, in relation to the Act, for the purpose of commenting upon paragraph (1) of the resolution.

A. Injury.

Regarding injury, the Code (Article 3) refers to "material injury", or a threat thereof, to a domestic industry or "material retardation" of the establishment of such an industry; it states that evaluation of injury shall be based on an examination of "all factors having a bearing on the state of the industry in question"; it enumerates a number of such factors; and it avers that no "one or several of those factors can necessarily give decisive guidance".

In implementing the Act, the Commission since 1954 has determined whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of sales at less than fair value. As did the Secretary of the Treasury in the years before 1954, the Commission has determined since that time whether the injury being caused or threatened is "material", and in many cases has considered injury in these terms. In evaluating injury the Commission has made an overall judgment, taking into account all relevant matters.

B. Causation.

The Code states (Article 3 (a)) that a determination of injury shall be made only when less than fair value sales "are demonstrably the principal cause of material injury to a domestic industry, or the "principal cause" of material retardation of the establishment of such an industry. It further states that in reaching this decision, there shall be weighed "the effect of" the less than fair value sales, on the one hand, and "all other factors taken together which may be adversely affecting the industry", on the other hand; that the determination be based on "positive findings and not on mere allegations or hypothetical" possibilities; and that in cases of "retarding the establishment of a new industry" in the importing country, "convincing evidence of the forthcoming establishment of an industry must be shown".

The Act states that the Commission must determine whether an industry in the United States is being or is likely to be injured, or is prevented from being established, "by reason of" the importation of less than fair value merchandise. Neither the Congress, nor, so far as we are aware, the Treasury Department during its administration of the "injury" provisions prior to 1954, nor the Commission, has attempted to define or qualify the term "by reason of", which has the dictionary meaning of "cause". Formulations which have been used from time to time in other statutes, such as "caused in whole or in part", or "have contributed substantially", or "caused in major part", have not been employed. The Commission has made an overall judgment, after considering all the relevant facts and circumstances, whether there has been injury "by reason of" less than fair value imported merchandise.

C. An Industry in the United States.

The Code defines "domestic industry" (Article 4) as referring to "the domestic producers as a whole of the like products", or to those whose "collective output of the products constitute a major proportion of the total domestic production of those products". In "exceptional circumstances", however, the industry

> "may, for the production in question, be divided into two or more competitive markets and the producers within each market regarded as a separate industry, if, because of transport costs, all the producers within such a market sell all or almost all of their production of the

> product in question in that market, and none, or almost none, of the product in question produced elsewhere in the country is sold in that market or if there exist special regional marketing conditions (for example, traditional patterns of distribution or consumer tastes) which result in an equal degree of isolation of the producers in such a market from the rest of the industry, provided, however, that injury may be found in such circumstances only if there is injury to all or almost all of the total production of the product in the market as defined."

The Act refers to "an industry in the United States". The Commission, in the absence of special circumstances where there has appeared to be a discrete geographical market area for the product, has considered the industry in national terms. In some cases, however, where there is such a discrete geographical market area, the Commission has determined that it constitutes "an industry in the United States" for the purpose of the Act. The Commission has considered all relevant factors affecting such a determination in arriving at its judgment.

* * *

The Commission is primarily a fact-finding agency, performing its duties by finding particular facts in particular investigations and applying the standards laid down by law to those facts as found. While it may find it necessary to interpret the law in the course of applying it to such particular facts, it has not done so by regulations or by general advisory opinions in advance of its findings of facts in particular investigations. Apart from those circumstances in which the obvious meaning of a proposed statute or international agreement

is so at odds with an existing instrument as to warrant a flat statement to that effect without more, it is our opinion that to attempt to interpret law and derive subsidiary standards of application thereof out of the context of the specific facts of particular investigations would tend to result in abstract interpretations and standards which have not emerged from the factual setting of a particular investigation and thus have not been tested against specific conditions for the carrying on of the trade and commerce of our country. Moreover, the Commission would not have had the advantage of briefs and arguments from interested parties in regard to the appropriate interpretation or standard to be applied to the facts of the particular investigation, and thus would be risking, through such an advance abstract interpretation, affecting the results of future investigations in circumstances which have strong adversary connotations. These considerations appear to us to be of particular importance where interpretations of a statute in relation to an international agreement might affect the performance of the international obligations of the United States. We are of the opinion that our position in these regards is consistent with the Commission's primary fact-finding function.

Accordingly, having examined those provisions of the Code and of the Act relating to the direct functions of the Commission under the Act, we limit ourselves to the statement that a) they are founded upon common basic concepts, b) they obviously differ

in language, and c) these differences in language do not appear obviously or patently to call for differing results in future cases regardless of their inevitably differing facts and circumstances. Indeed, we are unable, in the absence of the particular combination of facts and circumstances involved in each injury determination, to assert categorically that in such cases their application would lead to identical or to differing results.

If, following July 1, 1968, the Commission has occasion to perform its statutory duties under the Anti-Dumping Act (there are presently no cases thereunder pending before the Commission), and a question of consistency between a provision or provisions of the Code and of the Act is a relevant issue and there has been no intervening new American legislative action, the Commission should apply the principles of American law to the task of interpretation of the Act as it affects the facts of the investigation, including those principles relating to interpreting the Act so as to avoid inconsistency between it and the international obligations of the United States. If this proved not to be possible, the Commission should apply the provisions of the Act to the facts found, not those of the Code.[1/]

1/ See Restatement of the Law, Second, Foreign Relations Law of the United States (American Law Institute, 1965) Secs. 1,3(3), and Comment j. to Sec. 3. Section 3 (3) states that, "If a domestic law of the United States may be interpreted either in a manner consistent with international law or in a manner that is in conflict

We have also examined the provisions of the Code and of the Act which relate to those aspects of the Anti-Dumping Act whose Administration has been entrusted primarily to the Secretary of the Treasury -- relating to determination of "dumping"(Article 2), investigation and administration procedures (Articles 5, 6, and 7) and anti-dumping duties (Articles 8, 9, 10 and 11). With the exception of the provisions of Article 5 relating to the timing of investigation of the questions of less than fair value sales and of injury, these articles concern matters with which the Commission has not had practical administrative experience, and as to which we would not presume to speak authoritatively. It is our understanding that the Treasury Department takes the position that none of those provisions requires implementation in such a way as to be in conflict with any provision of law administered by it.

(fn 1/ contd.)

with international law, a court in the United States will interpret it in a manner that is consistent with international law." Section 1 defines "international law" to mean those rules of law applicable to a state or international organization "that cannot be modified unilaterally by it." After July 1, 1968, the International Anti-Dumping Code will contain rules of law applicable to the United States in its relations with other states which "cannot be modified unilaterally by it." The fact that it is an executive agreement, made by the President under his own authority, makes it no less binding upon the United States in this regard as an international obligation (Sections 122, 131). See also McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963); Murray v. Schooner Charming Betsy, 2 Cranch 64, 118 (1804); Lauritzen v. Larsen, 345 U.S. 571, 578 (1952).

We limit ourselves to the statement that the Code's provisions in these respects do not appear obviously or patently to call for different results or procedures than those required by the Act.

Regarding the timing of the initiation and subsequent investigation of "dumping and of injury resulting therefrom" (Article 5), the Code requires that an investigation shall be initiated, or continued after initiation, only if there is "evidence both on injury and on injury resulting therefrom", and that such evidence must be considered simultaneously beginning on the date when "provisional measures" (i.e., withholding of appraisement) are applied, unless requested otherwise by the exporter and importer.

Since the Act assigns to the Commission the task of determining whether injury has resulted or is likely to result by reason of the importation of merchandise at less than fair value, the question may be raised whether the Treasury Department, in conforming its anti-dumping regulations to the provisions of the Code as in its Proposed Procedures under the Act (32 Fed. Reg. 14955, Oct. 28, 1967), will in this respect be impinging upon the Commission's statutory function of determining whether injury has occurred or is likely. It appears to us that the answer depends upon the purpose of the simultaneity requirement, and the nature of the consideration of evidence of injury which will be undertaken by the Treasury Department.

The Proposed Treasury Regulations of October 26, 1967, require that "information indicating that an industry of the United States is being injured, or is likely to be injured, or prevented from being established", be furnished to the extent feasible (Sec. 53.27). It is our understanding that the Treasury Department would require that this evidence be furnished, and would examine it, not with a view to determining whether there has in fact been injury (a question which under statute is within the province of the Commission), but with the purpose of assuring itself that initiation of the investigation would not be futile, in the sense that it would be a waste of taxpayers' money for the Government to initiate a full anti-dumping investigation in the absence of any indication that it would possibly result in an assessment of anti-dumping duties.

If the Act is administered in this manner, as it is our understanding that the Treasury Department intends that it shall be, it is our view that the Commission's statutory function of determining the question of injury within three months of a determination by the Secretary of the Treasury that there have been sales at less than fair value, can continue to be performed by it as in the past.

* * *

The remaining articles of the Code (Articles 12, 13, 15, 16 and 17) relate to "formal" matters, to international consultative mechanisms, and to the possibility of anti-dumping action on behalf of a third country. The latter is wholly permissive in respect of any signatory; since the Act does not authorize such action by the

United States, it is not of practical significance at present.

* * *

Paragraphs (2) and (3) of S. Con. Res. 38 appear to involve questions of Constitutional law relating to the Presidential and the Congressional power affecting the foreign relations, and the regulation of the foreign commerce, of the United States, which are outside the special competence of this Commission. Accordingly, we offer no comment upon them.

APPENDIX

Sections 1, 2, and 4
of
Sherman Antitrust Act of 1890, as amended
(15 U.S.C. 1, 2, 4)

§1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1—7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1—7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, ch. 647, § 1, 26 Stat. 209; Aug. 17, 1937, ch. 690, title VIII, 50 Stat. 693; July 7, 1966, ch. 281, 80 Stat. 282.)

§2. Monopolizing trade a misdemeanor; penalty.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, ch. 647, § 2, 26 Stat. 209; July 7, 1966, ch. 281, 80 Stat. 282.)

§4. Jurisdiction of courts; duty of United States attorneys; procedure.

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1—7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. (July 2, 1890, ch. 647, § 4, 26 Stat. 209; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; June 25, 1948, ch. 646, § 1, 62 Stat. 909.)

Sections 73 and 74
of
Wilson Tariff Act of 1894, as amended
(15 U.S.C. 8, 9)

§ 8. Trusts in restraint of import trade illegal; penalty.

Every combination, conspiracy, trust, agreement, or contract is declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations, either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who shall be engaged in the importation of goods or any commodity from any foreign country in violation of this section, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and on conviction thereof in any court of the United States such person shall be fined in a sum not less than $100 and not exceeding $5,000, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months. (Aug. 27, 1894, ch. 349, § 73, 28 Stat. 570; Feb. 12, 1913, ch. 40, 37 Stat. 667.)

§ 9. Jurisdiction of courts; duty of United States attorneys; procedure.

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of section 8 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petitions setting forth the case and praying that such violations shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. (Aug. 27, 1894, ch. 349, § 74, 28 Stat. 570; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; June 25, 1948, ch. 646, § 1, 62 Stat. 909.)

Sections 4 and 5
of
Federal Trade Commission Act of 1914, as amended
(15 U.S.C. 44, 45)

§ 44. Definitions.

The words defined in this section shall have the following meaning when found in sections 41—46 and 47—58 of this title, to wit:

"Commerce" means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

"Corporation" shall be deemed to include any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.

"Documentary evidence" includes all documents, papers, correspondence, books of account, and financial and corporate records.

"Acts to regulate commerce" means the Act entitled "An Act to regulate commerce", approved February 14, 1887[1] and all Acts amendatory thereof and supplementary thereto and the Communications Act of 1934 and all Acts amendatory thereof and supplementary thereto.

"Antitrust Acts" means the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890; also sections 73—77, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", approved August 27, 1894; also the Act entitled "An Act to amend sections 73 and 76 of the Act of August 27, 1894, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes'", approved February 12, 1913; and also the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914. (Sept. 26, 1914, ch. 311, § 4, 38 Stat. 719; Mar. 21, 1938, ch. 49, § 2, 52 Stat. 111.)

[1] So in original. Probably should read "February 4, 1887".

§ 45. Unfair methods of competition unlawful; prevention by Commission.

(a) Declaration of unlawfulness; power to prohibit unfair practices.

(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or

agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 227 (a) of Title 7, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

(b) Proceeding by Commission; modifying and setting aside orders.

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41—46 and 47—58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however*, That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

(c) Review of order; rehearing.

Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the

Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28.

(d) Jurisdiction of court.

Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

(e) Precedence of proceedings; exemption from liability.

Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

(f) Service of complaints, orders and other processes; return.

Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

(g) Finality of order.

An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the court of appeals; or

(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.

(h) Same; order modified or set aside by Supreme Court.

If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(i) Same; order modified or set aside by Court of Appeals.

If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(j) Same; rehearing upon order or remand.

If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

(k) Definition of mandate.

As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

(l) Penalty for violation of order.

Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of

such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense. (Sept. 26, 1914, ch. 311, § 5, 38 Stat. 719; Feb. 13, 1925, ch. 229, § 2, 43 Stat. 939; Mar. 21, 1936, ch. 49, § 3, 49 Stat. 111; June 23, 1938, ch. 601, § 1107 (f), 52 Stat. 1028; June 25, 1948, ch. 646, § 32 (a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Mar. 16, 1950, ch. 61, § 4 (c), 64 Stat. 21; July 14, 1952, ch. 748, § 2, 66 Stat. 632; Aug. 23, 1958, Pub. L. 85-726, title XIV, § 1411, 72 Stat. 809; Aug. 28, 1958, Pub. L. 85-791, § 3, 72 Stat. 942; Sept. 2, 1958, Pub. L. 85-909, § 3, 72 Stat. 1750; June 11, 1960, Pub. L. 86-507, § 1(13), 74 Stat. 200.)

Sections 800 and 801
of
Revenue Act of 1916
(15 U.S.C. 71, 72)

PREVENTION OF UNFAIR METHODS OF COMPETITION

§ 71. Definition.

When used in sections 71—77 of this title the term "person" includes partnerships, corporations, and associations. (Sept. 8, 1916, ch. 463, § 800, 39 Stat. 798.)

§ 72. Importation or sale of articles at less than market value or wholesale price.

It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: *Provided*, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.

Any person who violates or combines or conspires with any other person to violate this section is guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $5,000, or imprisonment not exceeding one year, or both, in the discretion of the court.

Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefor in the district court of the United States for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee.

The foregoing provisions shall not be construed to deprive the proper State courts of jurisdiction in actions for damages thereunder. (Sept. 8, 1916, ch. 463, § 801, 39 Stat. 798.)

DUMPING INVESTIGATION

§ 160. Initiation of investigation; injury determination; findings; withholding appraisement; publication in Federal Register.

(a) Whenever the Secretary of the Treasury (hereinafter called the "Secretary") determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States or elsewhere at less than its fair value, he shall so advise the United States Tariff Commission, and the said Commission shall determine within three months thereafter whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States. The said Commission, after such investigation as it deems necessary, shall notify the Secretary of its determination, and, if that determination is in the affirmative, the Secretary shall make public a notice (hereinafter in sections 160—173 of this title called a "finding") of his determination and the determination of the said Commission. For the purposes of this subsection, the said Commission shall be deemed to have made an affirmative determination if the Commissioners of the said Commission voting are evenly divided as to whether its determination should be in the affirmative or in the negative. The Secretary's finding shall include a description of the class or kind of merchandise to which it applies in such detail as he shall deem necessary for the guidance of customs officers.

(b) Whenever, in the case of any imported merchandise of a class or kind as to which the Secretary has not so made public a finding, the Secretary has reason to believe or suspect, from the invoice or other papers or from information presented to him or to any person to whom authority under this section has been delegated, that the purchase price is less, or that the exporter's sales price is less or likely to be less, than the foreign market value (or, in the absence of such value, than the constructed value), he shall forthwith publish notice of that fact in the Federal Register and shall authorize, under such regulations as he may prescribe, the withholding of appraisement reports as to such merchandise entered, or withdrawn from warehouse, for consumption, not more than one hundred and twenty days before the question of dumping has been raised by or presented to him or any person to whom authority under this section has been delegated, until the further order of the Secretary, or until the Secretary has made public a finding as provided for in subdivision (a) in regard to such merchandise.

(c) The Secretary, upon determining whether foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and the United States Tariff Commission, upon making its determination under subsection (a) of this section, shall each publish such determination in the Federal Register, with a statement of the reasons therefor, whether such determination is in the affirmative or in the negative. (May 27, 1921, ch. 14, § 201, 42 Stat. 11; Sept. 1, 1954, ch. 1213, title III, § 301, 68 Stat. 1138; Aug. 14, 1958, Pub. L. 85-630, §§ 1, 4 (b), 72 Stat. 583, 585.)

§ 161. Amount of duty to be collected; determination of foreign market value of goods.

(a) In the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary of the Treasury has made public a finding as provided for in section 160 of this title, entered, or withdrawn from warehouse, for consumption, not more than one hundred and twenty days before the question of dumping was raised by or presented to the Secretary or any person to whom authority under said section has been delegated, and as to which no appraisement report has been made before such finding has been so made public, if the purchase price or the exporter's sales price is less than the foreign market value (or, in the absence of such value, than the constructed value) there shall be levied, collected, and paid, in addition to any other duties imposed thereon by law, a special dumping duty in an amount equal to such difference.

(b) In determining the foreign market value for the purposes of subsection (a) of this section, if it is established to the satisfaction of the Secretary or his delegate that the amount of any difference between the purchase price and the foreign market value (or that the fact that the purchase price is the same as the foreign market value) is wholly or partly due to—

(1) the fact that the wholesale quantities, in which such or similar merchandise is sold or, in the absence of sales, offered for sale for exportation to the United States in the ordinary course of trade, are less or are greater than the wholesale quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, then for exportation to countries other than the United States),

(2) other differences in circumstances of sale, or

(3) the fact that merchandise described in subdivision (C), (D), (E), or (F) of section 170a (3) of this title is used in determining foreign market value,

then due allowance shall be made therefor.

(c) In determining the foreign market value for the purposes of subsection (a) of this section, if it is established to the satisfaction of the Secretary or his delegate that the amount of any difference between the exporter's sales price and the foreign market value (or that the fact that the exporter's sales price is the same as the foreign market value) is wholly or partly due to—

(1) the fact that the wholesale quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the United States in the ordinary course of trade, are less or are greater than the wholesale quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, then for exportation to countries other than the United States),

(2) other differences in circumstances of sale, or

(3) the fact that merchandise described in subdivision (C), (D), (E), or (F) of section 170a (3) of this title is used in determining foreign market value,

then due allowance shall be made therefor. (May 27, 1921, ch. 14, § 202, 42 Stat. 11; Sept. 1, 1954, ch. 1213, title III, § 302, 68 Stat. 1139; Aug. 16, 1968, Pub. L. 90-630, §§ 2, 4 (b), 72 Stat. 563, 565.)

PURCHASE PRICE

§ 162. Purchase price.

For the purposes of this section and sections 160—171 of this title, the purchase price of imported merchandise shall be the price at which such merchandise has been purchased or agreed to be purchased, prior to the time of exportation, by the person by whom or for whose account the merchandise is imported, plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, less the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States; and plus the amount, if not included in such price, of any export tax imposed by the country of exportation on the exportation of the merchandise to the United States; and plus the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States; and plus the amount of any taxes imposed in the country of exportation upon the manufacturer, producer, or seller, in respect to the manufacture, production, or sale of the merchandise, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States. (May 27, 1921, ch. 14, § 203, 42 Stat. 12.)

EXPORTER'S SALES PRICE

§ 163. Determination of exporter's sales price.

For the purposes of sections 160—171 of this title, the exporter's sales price of imported merchandise shall be the price at which such merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter, plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, less (1) the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States, (2) the amount of the commissions, if any, for selling in the United States the particular merchandise under consideration, (3) an amount equal to the expenses, if any, generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise, and (4) the amount of any export tax imposed by the country of exportation on the exportation of the merchandise to the United States; and plus the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States; and plus the amount of any taxes imposed in the country of exportation upon the manufacturer, producer, or seller in respect to the manufacture, production, or sale of the merchandise, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States. (May 27, 1921, ch. 14, § 204, 42 Stat. 13.)

FOREIGN MARKET VALUE

§ 164. Determination of foreign market value.

For the purposes of sections 160—171 of this title the foreign market value of imported merchandise shall be the price, at the time of exportation of such merchandise to the United States, at which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, or if the Secretary determines that the quantity sold for home consumption is so small in relation to the quantity sold for exportation to countries other than the United States as to form an inadequate basis for comparison, then the price at which so sold or offered for sale for exportation to countries other than the United States), plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States, except that in the case of merchandise purchased or agreed to be purchased by the person by whom or for whose account the merchandise is imported, prior to the time of exportation, the foreign market value shall be ascertained as of the date of such purchase or agreement to purchase. In the ascertainment of foreign market value for the purposes of sections 160—171 of this title no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account. If such or similar merchandise is sold or, in the absence of sales, offered for sale through a sales agency or other organization related to the seller in any of the respects described in section 166 of this title, the prices at which such or similar merchandise is sold or, in the absence of sales, offered for sale by such sales agency or other organization may be used in determining the foreign market value. (May 27, 1921, ch. 14, § 205, 42 Stat. 13; Aug. 14, 1966, Pub. L. 89-630, § 3, 72 Stat. 884.)

Constructed Value

§ 165. Constructed value.

(a) Determination.

For the purposes of sections 160—171 of this title, the constructed value of imported merchandise shall be the sum of—

(1) the cost of materials (exclusive of any internal tax applicable in the country of exportation directly to such materials or their disposition, but remitted or refunded upon the exportation of the article in the production of which such materials are used) and of fabrication or other processing of any kind employed in producing such or similar merchandise, at a time preceding the date of exportation of the merchandise under consideration which would ordinarily permit the production of that particular merchandise in the ordinary course of business;

(2) an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise under consideration which are made by producers in the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, except that (A) the amount for general expenses shall not be less than 10 per centum of the cost as defined in paragraph (1), and (B) the amount for profit shall not be less than 8 per centum of the sum of such general expenses and cost; and

(3) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the merchandise under consideration in condition, packed ready for shipment to the United States.

(b) Transactions disregarded; best evidence.

For the purposes of this section, a transaction directly or indirectly between persons specified in any one of the paragraphs in subsection (c) of this section may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales in the market under consideration of merchandise of the same general class or kind as the merchandise under consideration. If a transaction is disregarded under the preceding sentence and there are no other transactions available for consideration, then the determination of the amount required to be considered shall be based on the best evidence available as to what the amount would have been if the transaction had occurred between persons not specified in any one of the paragraphs in subsection (c) of this section.

(c) Persons involved in disregarded transactions.

The persons referred to in subsection (b) of this section are:

(1) Members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants;

(2) Any officer or director of an organization and such organization;

(3) Partners;

(4) Employer and employee;

(5) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 per centum or more of the outstanding voting stock or shares of any organization and such organization; and

(6) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.

(May 27, 1921, ch. 14, § 206, 42 Stat. 213; Aug. 14, 1968, Pub. L. 88-630, § 4 (a), 72 Stat. 884.)

Exporter

§ 166. Exporter defined.

For the purposes of sections 160—171 of this title, the exporter of imported merchandise shall be the person by whom or for whose account the merchandise is imported into the United States:

(1) If such person is the agent or principal of the exporter, manufacturer, or producer; or

(2) If such person owns or controls, directly or indirectly, through stock ownership or control or otherwise, any interest in the business of the exporter, manufacturer, or producer; or

(3) If the exporter, manufacturer, or producer owns or controls, directly or indirectly, through stock ownership or control or otherwise, any interest in any business conducted by such person; or

(4) If any person or persons, jointly or severally, directly or indirectly, through stock ownership or control or otherwise, own or control in the aggregate 20 per centum or more of the voting power or control in the business carried on by the person by whom or for whose account the merchandise is imported into the United States, and also 20 per centum or more of such power or control in the business of the exporter, manufacturer, or producer.

(May 27, 1921, ch. 14, § 207, 42 Stat. 14.)

§ 167. Oath and bond of person for whose account merchandise is imported before delivery thereof.

In the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary of the Treasury has made public a finding as provided in section 160 of this title, and delivery of which has not been made by the collector before such finding has been so made public, unless the person by whom or for whose account such merchandise is imported makes oath before the collector, under regulations prescribed by the Secretary, that he is not an exporter, or unless such person declares under oath at the time of entry, under regulations prescribed by the Secretary, the exporter's sales price of such merchandise, it shall be unlawful for the collector to deliver the merchandise until such person has made oath before the collector, under regulations prescribed by the said Secretary, that the merchandise has not been sold or agreed to be sold by such person, and has given bond to the collector, under regulations prescribed by the Secretary, with sureties approved by the collector, in an amount equal to the estimated value of the merchandise, conditioned: (1) That he will report to the collector the exporter's sales price of the merchandise within thirty days after such merchandise has been sold or agreed to be sold in the United States; (2) that he will pay on demand from the collector the amount of special dumping duty, if any, imposed by sections 160—171 of this title, upon such merchandise; and (3) that he will furnish to the collector such information as may be in his possession and as may be necessary for the ascertainment of such duty, and will keep such records as to the sale of such merchandise as the Secretary may by regulation prescribe. (May 27, 1921, ch. 14, § 208, 42 Stat. 14.)

DUTIES OF APPRAISERS

§ 168. Appraisal and report to collector.

In the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary of the Treasury has made public a finding as provided in section 160 of this title, and as to which the appraiser or person acting as appraiser has made no appraisement report to the collector before such finding has been so made public, it shall be the duty of each appraiser or person acting as appraiser, by all reasonable ways and means to ascertain, estimate, and appraise (any invoice or affidavit thereto or statement of constructed value to the contrary notwithstanding) and report to the collector the foreign market value or the constructed value, as the case may be, the purchase price, and the exporter's sales price, and any other facts which the Secretary may deem necessary for the purposes of sections 160—171 of this title. (May 27, 1921, ch. 14, § 209, 42 Stat. 15; Aug. 14, 1958, Pub. L. 85-630, § 4 (b), 72 Stat. 585.)

§ 169. Appeals, etc., from determinations of appraisers.

For the purposes of sections 160—171 of this title, the determination of the appraiser or person acting as appraiser as to the foreign market value or the constructed value, as the case may be, the purchase price, and the exporter's sales price, and the action of the collector in assessing special dumping duty, shall have the same force and effect and be subject to the same right of appeal and protest, under the same conditions and subject to the same limitations; the United States Customs Court, and the Court of Customs and Patent Appeals shall have the same jurisdiction, powers, and duties in connection with such appeals and protests as in the case of appeals and protests relating to customs duties under existing law. (May 27, 1921, ch. 14, § 210, 42 Stat. 15; May 28, 1926, ch. 411, § 1, 44 Stat. 669; Mar. 2, 1929, ch. 488, § 1, 45 Stat. 1475; Aug. 14, 1958, Pub. L. 85-630, § 4 (b), 72 Stat. 585.)

DRAWBACKS

§ 170. Special duties treated as regular duties.

The special dumping duty imposed by sections 160—171 of this title shall be treated in all respects as regular customs duties within the meaning of all laws relating to the drawback of customs duties. (May 27, 1921, ch. 14, § 211, 42 Stat. 18.)

DEFINITIONS

§ 170a. Definitions.

For the purposes of sections 160—171 of this title—

(1) The term "sold or, in the absence of sales, offered for sale" means sold or, in the absence of sales, offered—

(A) to all purchasers at wholesale, or

(B) in the ordinary course of trade to one or more selected purchasers at wholesale at a price

which fairly reflects the market value of the merchandise,

without regard to restrictions as to the disposition or use of the merchandise by the purchaser except that, where such restrictions are found to affect the market value of the merchandise, adjustment shall be made therefor in calculating the price at which the merchandise is sold or offered for sale.

(2) The term "ordinary course of trade" means the conditions and practices which, for a reasonable time prior to the exportation of the merchandise under consideration, have been normal in the trade under consideration with respect to merchandise of the same class or kind as the merchandise under consideration.

(3) The term "such or similar merchandise" means merchandise in the first of the following categories in respect of which a determination for the purposes of sections 160—171 of this title can be satisfactorily made:

(A) The merchandise under consideration and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, the merchandise under consideration.

(B) Merchandise which is identical in physical characteristics with, and was produced by another person in the same country as, the merchandise under consideration.

(C) Merchandise (i) produced in the same country and by the same person as the merchandise under consideration, (ii) like the merchandise under consideration in component material or materials and in the purposes for which used, and (iii) approximately equal in commercial value to the merchandise under consideration.

(D) Merchandise which satisfies all the requirements of subdivision (C) except that it was produced by another person.

(E) Merchandise (i) produced in the same country and by the same person and of the same general class or kind as the merchandise under consideration, (ii) like the merchandise under consideration in the purposes for which used, and (iii) which the Secretary or his delegate determines may reasonably be compared for the purposes of sections 160—171 of this title with the merchandise under consideration.

(F) Merchandise which satisfies all the requirements of subdivision (E) except that it was produced by another person.

(4) The term "usual wholesale quantities", in any case in which the merchandise in respect of which value is being determined is sold in the market under consideration at different prices for different quantities, means the quantities in which such merchandise is there sold at the price or prices for one quantity in an aggregate volume which is greater than the aggregate volume sold at the price or prices for any other quantity. (May 27, 1921, ch. 14, § 212, as added Aug. 14, 1958, Pub. L. 85-630, § 5, 72 Stat. 583.)

SHORT TITLE

§ 171. Citation.

Sections 160—171 of this title may be cited as the "Antidumping Act, 1921." (May 27, 1921, ch. 14, § 213, formerly § 212, 42 Stat. 18, renumbered Aug. 14, 1958, Pub. L. 85-630, § 5, 72 Stat. 583.)

ADDITIONAL DEFINITIONS

§ 172. Additional definitions.

When used in sections 160—171 of this title—

The term "person" includes individuals, partnerships, corporations, and associations; and

The term "United States" includes all Territories and possessions subject to the jurisdiction of the United States, except the Virgin Islands, the islands of Guam and Tutuila, and the Canal Zone. (May 27, 1921, ch. 14, § 406, 42 Stat. 18; Proc. No. 2696, July 4, 1946, 11 F. R. 7517, 60 Stat. 1352.)

RULES AND REGULATIONS

§ 173. Rules and regulations.

The Secretary shall make rules and regulations necessary for the enforcement of sections 160—172 of this title. (May 27, 1921, ch. 14, § 407, 42 Stat. 18.)

Section 337
of
Tariff Act of 1930, as amended
(19 U.S.C. 1337)

§ 1337. Unfair practices in import trade.

(a) Unfair methods of competition declared unlawful.

Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are declared unlawful, and when found by the President to exist shall be dealt with, in addition to any other provisions of law, as hereinafter provided.

(b) Investigations of violations by Commission.

To assist the President in making any decisions under this section the commission is authorized to investigate any alleged violation hereof on complaint under oath or upon its initiative.

(c) Hearings and review.

The commission shall make such investigation and give such notice and afford such hearing, and when deemed proper by the commission such rehearing, with opportunity to offer evidence, oral or written, as it may deem sufficient for a full presentation of the facts involved in such investigation. The testimony in every such investigation shall be reduced to writing, and a transcript thereof with the findings and recommendation of the commission shall be the official record of the proceedings and findings in the case, and in any case where the findings in such investigation show a violation of this section, a copy of the findings shall be promptly mailed or delivered to the importer or consignee of such articles. Such findings, if supported by evidence, shall be conclusive, except that a rehearing may be granted by the commission and except that, within such time after said findings are made and in such manner as appeals may be taken from decisions of the United States Customs Court, an appeal may be taken from said findings upon a question or questions of law only to the United States Court of Customs and Patent Appeals by the importer or consignee of such articles. If it shall be shown to the satisfaction of said court that further evidence should be taken, and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before the commission, said court may order such additional evidence to be taken before the commission in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts or make new findings by reason of additional evidence, which, if supported by evidence, shall be conclusive as to the facts except that within such time and in such manner an appeal may be taken as aforesaid upon a question or questions of law only. The judgment of said court shall be final.

(d) Transmission of findings to President.

The final findings of the commission shall be transmitted with the record to the President.

(e) Exclusion of articles from entry.

Whenever the existence of any such unfair method or act shall be established to the satisfaction of the President he shall direct that the articles concerned in such unfair methods or acts, imported by any person violating the provisions of this chapter, shall be excluded from entry into the United States, and upon information of such action by the President, the Secretary of the Treasury shall, through the proper officers, refuse such entry. The decision of the President shall be conclusive.

(f) Entry under bond.

Whenever the President has reason to believe that any article is offered or sought to be offered for entry into the United States in violation of this section but has not information sufficient to satisfy him thereof, the Secretary of the Treasury shall, upon his request in writing, forbid entry thereof until such investigation as the President may deem necessary shall be completed; except that such articles shall be entitled to entry under bond prescribed by the Secretary of the Treasury.

(g) Continuance of exclusion.

Any refusal of entry under this section shall continue in effect until the President shall find and instruct the Secretary of the Treasury that the conditions which led to such refusal of entry no longer exist.

(h) Definition.

When used in this section and in sections 1338 and 1340 of this title, the term "United States" includes the several States and Territories, the District of Columbia, and all possessions of the United States except the Virgin Islands, American Samoa, and the Island of Guam. (June 17, 1930, ch. 497, title III, § 337, 46 Stat. 703; Proc. No. 2695, July 4, 1946, 11 F. R. 7517, 60 Stat. 1353; Aug. 30, 1988, Pub. L. 100-418, § 1211 (c) (1), 102 Stat. 1212.)

§ 1337a. Same; importation of products produced under process covered by claims of unexpired patent.

The importation for use, sale, or exchange of a product made, produced, processed, or mined under or by means of a process covered by the claims of any unexpired valid United States letters patent, shall have the same status for the purposes of section 1337 of this title as the importation of any product or article covered by the claims of any unexpired valid United States letters patent. (July 8, 1940, ch. 618, 54 Stat. 724.)

Article VI
of
General Agreement on Tariffs and Trade

Article VI

Anti-dumping and Countervailing Duties

1. The contracting parties recognise that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

(a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,

(b) in the absence of such domestic price, is less than either

(i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or

(ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.

2. In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.

3. No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise.

4. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.

5. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.

6. (a) No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

(b) The CONTRACTING PARTIES may waive the requirement of sub-paragraph (a) of this paragraph so as to permit a contracting party to levy an anti-dumping or countervailing duty on the importation of any product for the purpose of offsetting dumping or subsidization which causes or threatens material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party. The CONTRACTING PARTIES shall waive the requirements of sub-paragraph (a) of this paragraph, so as to permit the levying of a countervailing duty, in cases in which they find that a subsidy is causing or threatening material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party.

(c) In exceptional circumstances, however, where delay might cause damage which would be difficult to repair, a contracting party may levy a countervailing duty for the purpose referred to in sub-paragraph (b) of this paragraph without the prior approval of the CONTRACTING PARTIES; Provided that such action shall be reported immediately to the CONTRACTING PARTIES and that the countervailing duty shall be withdrawn promptly if the CONTRACTING PARTIES disapprove.

7. A system for the stabilization of the domestic price or of the return to domestic producers of a primary commodity, independently of the movements of export prices, which results at times in the sale of the commodity for export at a price lower than the comparable price charged for the like commodity to buyers in the domestic market, shall be presumed not to result in material injury within the meaning of paragraph 6 if it is determined by consultation among the contracting parties substantially interested in the commodity concerned that:

(a) the system has also resulted in the sale of the commodity for export at a price higher than the comparable price charged for the like commodity to buyers in the domestic market, and

(b) the system is so operated, either because of the effective regulation of production, or otherwise, as not to stimulate exports unduly or otherwise seriously prejudice the interests of other contracting parties.

PROTOCOL OF PROVISIONAL APPLICATION OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE

1. The Governments of the COMMONWEALTH OF AUSTRALIA, the KINGDOM OF BELGIUM (in respect of its metropolitan territory), CANADA, the FRENCH REPUBLIC (in respect of its metropolitan territory), the GRAND-DUCHY OF LUXEMBURG, the KINGDOM OF THE NETHERLANDS (in respect of its metropolitan territory), the UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND (in respect of its metropolitan territory), and the UNITED STATES OF AMERICA, undertake, provided that this Protocol shall have been signed on behalf of all the foregoing Governments not later than November 15, 1947, to apply provisionally on and after January 1, 1948:

(a) Parts I and III of the General Agreement on Tariffs and Trade, and
(b) Part II of that Agreement to the fullest extent not inconsistent with existing legislation.

2. The foregoing Governments shall make effective such provisional application of the General Agreement, in respect of any of their territories other than their metropolitan territories, on or after January 1, 1948, upon the expiration of thirty days from the day on which notice of such application is received by the Secretary-General of the United Nations.

3. Any other Government signatory to this Protocol shall make effective such provisional application of the General Agreement, on or after January 1, 1948, upon the expiration of thirty days from the day of signature of this Protocol on behalf of such Government.

4. This Protocol shall remain open for signature at the Headquarters of the United Nations, (a) until November 15, 1947, on behalf of any Government named in paragraph 1 of this Protocol which has not signed it on this day, and (b) until June 30, 1948, on behalf of any other Government signatory to the Final Act adopted at the conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment which has not signed it on this day.

5. Any Government applying this Protocol shall be free to withdraw such application, and such withdrawal shall take effect upon the expiration of sixty days from the day on which written notice of such withdrawal is received by the Secretary-General of the United Nations.

6. The original of this Protocol shall be deposited with the Secretary-General of the United Nations, who will furnish certified copies thereof to all interested Governments.

IN WITNESS WHEREOF the respective Representatives, after having communicated their full powers, found to be in good and due form, have signed this Protocol.

DONE at Geneva, in a single copy, in the English and French languages, both texts authentic, this thirtieth day of October, one thousand nine hundred and forty-seven.

AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE

The parties to this Agreement,

Considering that Ministers on 21 May 1963 agreed that a significant liberalisation of world trade was desirable and that the comprehensive trade negotiations, the 1964 Trade Negotiations, should deal not only with tariffs but also with non-tariff barriers;

Recognising that anti-dumping practices should not constitute an unjustifiable impediment to international trade and that anti-dumping duties may be applied against dumping only if such dumping causes or threatens material injury to an established industry or materially retards the establishment of an industry;

Considering that it is desirable to provide for equitable and open procedures as the basis for a full examination of dumping cases; and

Desiring to interpret the provisions of Article VI of the General Agreement and to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation;

Hereby agree as follows:

PART I - ANTI-DUMPING CODE

Article 1

The imposition of an anti-dumping duty is a measure to be taken only under the circumstances provided for in Article VI of the General Agreement. The following provisions govern the application of this Article, in so far as action is taken under anti-dumping legislation or regulations.

A. DETERMINATION OF DUMPING

Article 2

(a) For the purpose of this Code a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

(b) Throughout this Code the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

(c) In the case where products are not imported directly from the country of origin but are exported to the country of importation from an intermediate country, the price at which the products are sold from the country of export to the country of importation shall normally be compared with the comparable price in the country of export. However, comparison may be made with the price in the country of origin, if, for example, the products are merely trans-shipped through the country of export, or such products are not produced in the country of export, or there is no comparable price for them in the country of export.

(d) When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to any third country which may be the highest such export price but should be a representative price, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits. As a general rule, the addition for profit shall not exceed the profit normally realized on sales of products of the same general category in the domestic market of the country of origin.

(e) In cases where there is no export price or where it appears to the authorities[1] concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

(f) In order to effect a fair comparison between the export price and the domestic price in the exporting country (or the country of origin) or, if applicable, the price established pursuant to the provisions of Article VI:1(b) of the General Agreement, the two prices shall be compared at the same level of trade, normally at the ex factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for the differences in conditions and terms of sale, for the differences in taxation, and for the other differences affecting price comparability. In the cases referred to in Article 2(e) allowance for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made.

(g) This Article is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I of the General Agreement.

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[1] When in this Code the term "authorities" is used, it shall be interpreted as meaning authorities at an appropriate, senior level.

B. DETERMINATION OF MATERIAL INJURY, THREAT OF MATERIAL INJURY AND MATERIAL RETARDATION

Article 3

Determination of Injury[1]

(a) A determination of injury shall be made only when the authorities concerned are satisfied that the dumped imports are demonstrably the principal cause of material injury or of threat of material injury to a domestic industry or the principal cause of material retardation of the establishment of such an industry. In reaching their decision the authorities shall weigh, on one hand, the effect of the dumping and, on the other hand, all other factors taken together which may be adversely affecting the industry. The determination shall in all cases be based on positive findings and not on mere allegations or hypothetical possibilities. In the case of retarding the establishment of a new industry in the country of importation, convincing evidence of the forthcoming establishment of an industry must be shown, for example that the plans for a new industry have reached a fairly advanced stage, a factory is being constructed or machinery has been ordered.

(b) The valuation of injury - that is the evaluation of the effects of the dumped imports on the industry in question - shall be based on examination of all factors having a bearing on the state of the industry in question, such as: development and prospects with regard to turnover, market share, profits, prices (including the extent to which the delivered, duty-paid price is lower or higher than the comparable price for the like product prevailing in the course of normal commercial transactions in the importing country), export performance, employment, volume of dumped and other imports, utilisation of capacity of domestic industry, and productivity; and restrictive trade practices. No one or several of these factors can necessarily give decisive guidance.

(c) In order to establish whether dumped imports have caused injury, all other factors which, individually or in combination, may be adversely affecting the industry shall be examined, for example: the volume and prices of undumped imports of the product in question, competition between the domestic producers themselves, contraction in demand due to substitution of other products or to changes in consumer tastes.

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[1] When in this Code the term "injury" is used, it shall, unless otherwise specified, be interpreted as covering cause of material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry.

(d) The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of production in terms of such criteria as: the production process, the producers' realisations, profits. When the domestic production of the like product has no separate identity in these terms the effect of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

(e) A determination of threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause material injury must be clearly foreseen and imminent.[1]

(f) With respect to cases where material injury is threatened by dumped imports, the application of anti-dumping measures shall be studied and decided with special care.

Article 4

Definition of Industry

(a) In determining injury the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products except that

(i) when producers are importers of the allegedly dumped product the industry may be interpreted as referring to the rest of the producers;

(ii) in exceptional circumstances a country may, for the production in question, be divided into two or more competitive markets and the producers within each market regarded as a separate industry, if, because of transport costs, all the producers within such a market sell all or almost all of their production of the product in question in that market, and none, or almost none, of the product in question produced elsewhere in the country is sold in that market or if there exist special regional marketing conditions (for example, traditional patterns of distribution or consumer tastes) which result in an equal degree of isolation of the producers in such a market

[1] One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the immediate future, substantially increased importations of the product at dumped prices.

from the rest of the industry, provided, however, that injury may be found in such circumstances only if there is injury to all or almost all of the total production of the product in the market as defined.

(b) Where two or more countries have reached such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the industry referred to in Article 4(a).

(c) The provisions of Article 3(d) shall be applicable to this Article.

C. INVESTIGATION AND ADMINISTRATION PROCEDURES

Article 5

Initiation and Subsequent Investigation

(a) Investigations shall normally be initiated upon a request on behalf of the industry[1] affected, supported by evidence both of dumping and of injury resulting therefrom for this industry. If in special circumstances the authorities concerned decide to initiate an investigation without having received such a request, they shall proceed only if they have evidence both of dumping and of injury resulting therefrom.

(b) Upon initiation of an investigation and thereafter, the evidence of both dumping and injury should be considered simultaneously. In any event the evidence of both dumping and injury shall be considered simultaneously in the decision whether or not to initiate an investigation, and thereafter, during the course of the investigation, starting on a date not later than the earliest date on which provisional measures may be applied, except in the cases provided for in Article 10(d) in which the authorities accept the request of the exporter and the importer.

(c) An application shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There should be immediate termination in cases where the margin of dumping or the volume of dumped imports, actual or potential, or the injury is negligible.

(d) An anti-dumping proceeding shall not hinder the procedures of customs clearance.

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[1] As defined in Article 4.

Article 6

Evidence

(a) The foreign suppliers and all other interested parties shall be given ample opportunity to present in writing all evidence that they consider useful in respect to the anti-dumping investigation in question. They shall also have the right, on justification, to present evidence orally.

(b) The authorities concerned shall provide opportunities for the complainant and the importers and exporters known to be concerned and the governments of the exporting countries, to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph (c) below, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

(c) All information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom he acquired the information) or which is provided on a confidential basis by parties to an anti-dumping investigation shall be treated as strictly confidential by the authorities concerned who shall not reveal it, without specific permission of the party submitting such information.

(d) However, if the authorities concerned find that a request for confidentiality is not warranted and if the supplier is either unwilling to make the information public or to authorise its disclosure in generalised or summary form, the authorities would be free to disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.

(e) In order to verify information provided or to obtain further details the authorities may carry out investigations in other countries as required, provided they obtain the agreement of the firms concerned and provided they notify the representatives of the government of the country in question and unless the latter object to the investigation.

(f) Once the competent authorities are satisfied that there is sufficient evidence to justify initiating an anti-dumping investigation pursuant to Article 5 representatives of the exporting country and the exporters and importers known to be concerned shall be notified and a public notice may be published.

(g) Throughout the anti-dumping investigation all parties shall have a full opportunity for the defence of their interests. To this end, the authorities concerned shall, on request, provide opportunities for all directly interested parties to meet those parties with adverse interests, so

that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting and failure to do so shall not be prejudicial to that party's case.

(h) The authorities concerned shall notify representatives of the exporting country and the directly interested parties of their decisions regarding imposition or non-imposition of anti-dumping duties, indicating the reasons for such decisions and the criteria applied, and shall, unless there are special reasons against doing so, make public the decisions.

(i) The provisions of this Article shall not preclude the authorities from reaching preliminary determinations, affirmative or negative, or from applying provisional measures expeditiously. In cases in which any interested party withholds the necessary information, a final finding, affirmative or negative, may be made on the basis of the facts available.

Article 7

Price Undertakings

(a) Anti-dumping proceedings may be terminated without imposition of anti-dumping duties or provisional measures upon receipt of a voluntary undertaking by the exporters to revise their prices so that the margin of dumping is eliminated or to cease to export to the area in question at dumped prices if the authorities concerned consider this practicable, e.g. if the number of exporters or potential exporters of the product in question is not too great and/or if the trading practices are suitable.

(b) If the exporters concerned undertake during the examination of a case, to revise prices or to cease to export the product in question, and the authorities concerned accept the undertaking, the investigation of injury shall nevertheless be completed if the exporters so desire or the authorities concerned so decide. If a determination of no injury is made, the undertaking given by the exporters shall automatically lapse unless the exporters state that it shall not lapse. The fact that exporters do not offer to give such undertakings during the period of investigation, or do not accept an invitation made by the investigating authorities to do so, shall in no way be prejudicial to the consideration of the case. However, the authorities are of course free to determine that a threat of injury is more likely to be realised if the dumped imports continue.

D. ANTI-DUMPING DUTIES AND PROVISIONAL MEASURES

Article 8

Imposition and Collection of Anti-Dumping Duties

(a) The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing country or customs territory. It is desirable that the imposition be permissive in all countries or customs territories parties to this Agreement, and that the duty be less than the margin, if such lesser duty would be adequate to remove the injury to the domestic industry.

(b) When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.

(c) The amount of the anti-dumping duty must not exceed the margin of dumping as established under Article 2. Therefore, if subsequent to the application of the anti-dumping duty it is found that the duty so collected exceeds the actual dumping margin, the amount in excess of the margin shall be reimbursed as quickly as possible.

(d) Within a basic price system the following rules shall apply provided that their application is consistent with the other provisions of this Code:

If several suppliers from one or more countries are involved, anti-dumping duties may be imposed on imports of the product in question found to have been dumped and to be causing injury from the country or countries concerned, the duty being equivalent to the amount by which the export price is less than the basic price established for this purpose, not exceeding the lowest normal price in the supplying country or countries where normal conditions of competition are prevailing. It is understood that for products which are sold below this already established basic price a new anti-dumping investigation shall be carried out in each particular case, when so demanded by the interested parties and the demand is supported by relevant evidence. In cases where no dumping is found, anti-dumping duties collected shall be reimbursed as quickly as possible. Furthermore, if it can be found that the duty so collected exceeds the actual dumping margin, the amount in excess of the margin shall be reimbursed as quickly as possible.

(c) When the industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in Article 4(a)(ii), anti-dumping duties shall only be definitively collected on the products in question consigned for final consumption to that area, except in cases where the exporter shall, prior to the imposition of anti-dumping duties, be given an opportunity to cease dumping in the area concerned. In such cases, if an adequate assurance to this effect is promptly given, anti-dumping duties shall not be imposed, provided, however, that if the assurance is not given or is not fulfilled, the duties may be imposed without limitation to an area.

Article 9

Duration of Anti-Dumping Duties

(a) An anti-dumping duty shall remain in force only as long as it is necessary in order to counteract dumping which is causing injury.

(b) The authorities concerned shall review the need for the continued imposition of the duty, where warranted, on their own initiative or if interested suppliers or importers of the product so request and submit information substantiating the need for review.

Article 10

Provisional Measures

(a) Provisional measures may be taken only when a preliminary decision has been taken that there is dumping and when there is sufficient evidence of injury.

(b) Provisional measures may take the form of a provisional duty or, preferably, a security - by deposit or bond - equal to the amount of the anti-dumping duty provisionally estimated, being not greater than the provisionally estimated margin of dumping. Withholding of appraisement is an appropriate provisional measure provided that the normal duty and the estimated amount of the anti-dumping duty be indicated and as long as the withholding of appraisement is subject to the same conditions as other provisional measures.

(c) The authorities concerned shall inform representatives of the exporting country and the directly interested parties of their decisions regarding imposition of provisional measures indicating the reasons for such decisions and the criteria applied, and shall, unless there are special reasons against doing so, make public such decisions.

(d) The imposition of provisional measures shall be limited to as short a period as possible. More specifically, provisional measures shall not be imposed for a period longer than three months or, on decision of the authorities concerned upon request by the exporter and the importer, six months.

(e) The relevant provisions of Article 8 shall be followed in the application of provisional measures.

Article 11

Retroactivity

Anti-dumping duties and provisional measures shall only be applied to products which enter for consumption after the time when the decision taken under Articles 8(a) and 10(a), respectively, enters into force, except that in cases:

(i) where a determination of material injury (but not of a threat of material injury, or of a material retardation of the establishment of an industry) is made or where the provisional measures consist of provisional duties and the dumped imports carried out during the period of their application would, in the absence of these provisional measures, have caused material injury, anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

If the anti-dumping duty fixed in the final decision is higher than the provisionally paid duty, the difference shall not be collected. If the duty fixed in the final decision is lower than the provisionally paid duty or the amount estimated for the purpose of the security, the difference shall be reimbursed or the duty recalculated, as the case may be.

(ii) where appraisement is suspended for the product in question for reasons which arose before the initiation of the dumping case and which are unrelated to the question of dumping, retroactive assessment of anti-dumping duties may extend back to a period not more than 120 days before the submission of the complaint.

(iii) where for the dumped product in question the authorities determine

(a) either that there is a history of dumping which caused material injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause material injury, and

(b) that the material injury is caused by sporadic dumping (massive dumped imports of a product in a relatively short period) to such an extent that, in order to preclude it recurring, it appears necessary to assess an anti-dumping duty retroactively on those imports.

the duty may be assessed on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures.

E. ANTI-DUMPING ACTION ON BEHALF OF A THIRD COUNTRY

Article 12

(a) An application for anti-dumping action on behalf of a third country shall be made by the authorities of the third country requesting action.

(b) Such an application shall be supported by price information to show that the imports are being dumped and by detailed information to show that the alleged dumping is causing injury to the domestic industry concerned in the third country. The government of the third country shall afford all assistance to the authorities of the importing country to obtain any further information which the latter may require.

(c) The authorities of the importing country in considering such an application shall consider the effects of the alleged dumping on the industry concerned as a whole in the third country; that is to say the injury shall not be assessed in relation only to the effect of the alleged dumping on the industry's exports to the importing country or even on the industry's total exports.

(d) The decision whether or not to proceed with a case shall rest with the importing country. If the importing country decides that it is prepared to take action, the initiation of the approach to the CONTRACTING PARTIES seeking their approval for such action shall rest with the importing country.

PART II - FINAL PROVISIONS

Article 13

This Agreement shall be open for acceptance, by signature or otherwise, by contracting parties to the General Agreement and by the European Economic Community. The Agreement shall enter into force on 1 July 1968 for each party which has accepted it by that date. For each party accepting the Agreement after that date, it shall enter into force upon acceptance.

Article 14

Each party to this Agreement shall take all necessary steps, of a general or particular character, to ensure, not later than the date of the entry into force of the Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of the Anti-Dumping Code.

Article 15

Each party to this Agreement shall inform the CONTRACTING PARTIES to the ...al Agreement of any changes in its anti-dumping laws and regulations and ...s administration of such laws and regulations.

Article 16

Each party to this Agreement shall report to the CONTRACTING PARTIES ...ually on the administration of its anti-dumping laws and regulations, giving ...ails of the cases in which anti-dumping duties have been assessed ...tively.

Article 17

The parties to this Agreement shall request the CONTRACTING PARTIES to ...blish a Committee on Anti-Dumping Practices composed of representatives of ...parties to this Agreement. The Committee shall normally meet once each year ...the purpose of affording parties to this Agreement the opportunity of ...ulting on matters relating to the administration of anti-dumping systems in ...participating country or customs territory as it might affect the operation ...the Anti-Dumping Code or the furtherance of its objectives. Such consulta... ...shall be without prejudice to Articles XXII and XXIII of the General ...ment.

...his Agreement shall be deposited with the Director-General to the ...TRACTING PARTIES who shall promptly furnish a certified copy thereof and a ...ification of each acceptance thereof to each contracting party to the General ...ment and to the European Economic Community.

...his Agreement shall be registered in accordance with the provisions of ...102 of the Charter of the United Nations.

...NE at Geneva this thirtieth day of June, one thousand nine hundred and ...seven, in a single copy, in the English and French languages, both texts ...uthentic.